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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

RANDOLPH C. HACKFORD, LAWANNA KAY, REED THOMPSON, ALLEN D. REYOS AND ORANNA BUMGARNER MOOSMAN, FOR THEMSELVES AND FOR AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,
PETITIONERS,

V.

FIRST SECURITY BANK OF UTAH, N.A.,
DEFENDANT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. If Congress substitutes a bank in the historic Constitutional role of the United States as a guardian and trustee of Indians and their property, may it be implied that the commercial trustee is shielded from trust liability to the Indian beneficiaries by any incidents of the "sovereign immunity" doctrine?

2. Whether protections created by an Act of Congress for "members" of a particular Indian tribe may be ignored by the trustee, or changed by administrative interpretations of the Bureau of Indian Affairs so that they apply to the "Tribe" and not to its "members," and be exempt from judicial review?

3. May protections under federal securities laws for securities holders in general and American Indians and their property in particular, confirmed by prior decisions of this Court, be made subject to or controlled by provisions of state corporate law?

4. Are Native Americans denied due process when claims that their trustee sold their assets for inadequate consideration are adjudicated without taking *any* evidence supporting the fact finder's conclusions as to value?

5. When a Court of Appeals denies that it "is bound to *follow* the Supreme Court's decision" (App.* A, pp. 10-11) (emphasis added) under either res judicata or collateral estoppel, in a related case involving the same parties and common issues, and rearticulates its own holding which had theretofore been rejected by this Court,[1] should this Court direct further proceedings consistent with its prior opinion?

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*The abbreviation "App." refers to the separately bound Appendix to this Petition.

[1]In Affiliated Ute Citizens v. United States, 406 U.S. 128, 155 (1972)

PARTIES TO THE PROCEEDINGS BELOW

The parties in the proceedings below are listed in the caption, other than that Anita Reyos, the lead plaintiff in *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972) was added as a party at the request of the respondent Bank and that the Petitioners are the class representatives of all so-called "mixed-blood" Ute Indians, as defined by the Ute Termination Act of 1954.

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this Court held that the Respondent "engaged in more than ministerial functions," and "[t]heir acts were clearly within the Reach of Rule 10b-5," rejecting the contrary holding of the Court of Appeals expressed in the same terms. The court below held that the same Respondent "was simply not engaged in *anything more than ministerial functions*" (App. A, p. 18) (emphasis added) and had no duty under Rule 10b-5.

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OPINIONS BELOW

The opinion of the Court of Appeals, appearing at App. A, is unreported. The opinion and findings of the District Court on the merits, appearing at App. C, is reported at 521 F. Supp. 541. A separate opinion of the District Court denying rehearing, appearing at App. D, is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on January 31, 1983. A timely petition for rehearing and suggestion of rehearing *en banc* was denied on March 21, 1983, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), time for filing of which expires June 19, 1983. *See* 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

1 Stat. 51 (1789) (reenacting Art. III of the Northwest Ordinance of 1787):

> The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, . . .

The Ute Termination Act ("Termination Act") is published at 25 U.S.C. §§ 677-677aa and is reproduced in its entirety at App. E. Pertinent provisions concerning establishment of corporations and trusts are at Section 13 (25 U.S.C. § 677*l*):

> The plan for division of the assets among the members of the mixed-blood group may include:
>
> • • •

> (3) Organization of corporations for the grazing of livestock, handling of water and water rights, and the shares therein may be issued to the members of said group in proportion to their interests in the assets of such corporations. . . .
>
> (4) A transfer of assets to one or more trustees designated by said group who shall hold title to all or any part of the property of said group for management or liquidation purposes under terms and conditions prescribed by said mixed-blood group. . . .

Section 15 (25 U.S.C. §677n):

> . . . In the event a *member* of the mixed-blood group determines to dispose of his interests in any of said real property at any time within ten years from August 27, 1954, he shall first offer it to the *members* of the tribe . . . . (Emphasis added.)

and Section 22 (25 U.S.C. §677u):

> . . . the Secretary [of Interior] shall protect the rights of members of the tribe who are minors, non compos mentis, or, in the opinion of the Secretary, in need of assistance in conducting their affairs, by such means as he may deem adequate . . . .

The Plans for Division and Distribution, held by this Court to be action taken "pursuant to the Partition Act [and] contemplated by the Act," (406 U.S. 128, 143-44) have the dignity of regulations and provide in pertinent part:

> Shares of stock distributed to members who have no present use for the same may be leased or sold at the will of the holder thereof subject to the articles of incorporation[2] and by-laws of the corporation and in accordance with law. (Exhibit 20.)

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[2]The Articles of Incorporation are Exhibits 76 and 77 and for both corporations provide:

> If any stockholder who is a member of the mixed-blood group of said Ute Indian Tribe determines to sell or dispose of his stock in this

The relevant provisions of the Securities Exchange Act of 1934 ("Exchange Act") are reproduced at App. F and include Section 10(b) [15 U.S.C. § 78j(b)] and Rule 10b-5 adopted thereunder (17 C.F.R. 240.10b-5).

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corporation at any time prior to August 27, 1964, he shall first offer it to the *members of the tribe, including the mixed-blood and full blood members thereof,* and no sale of any of said stock prior to said date shall be valid unless and until such offer is made to said *members of the tribe* in such form as may be approved by the Secretary of Interior. (Emphasis added.)

Petitioners, Randolph C. Hackford, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in this proceeding rendered on January 31, 1983.

STATEMENT OF THE CASE

The issues framed by the opinion of the Court of Appeals are simple, being confined to three purely legal conclusions with respect to (1) the interrelationship of the trust and Indian laws of the United States, (2) the interface of federal securities laws with state corporate law, and (3) the application of res judicata and collateral estoppel. The facts, though complex, are also favorable for the consideration of this Court, being essentially stipulated.

Petitioners are so-called "mixed-blood"[3] Ute Indians of the Uintah and Ouray Reservation, Utah, who were "terminated"[4] from federal supervision by one of a series of acts of Congress adopted in 1954. The mixed-bloods thus terminated brought suit against the fiduciary established for them by the Secretary of the Interior, alleging breach of trust and breach of the anti-fraud provisions of the securi-

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[3]The term "mixed-blood" is mandated by Section 2 of the Termination Act. (App. E. at p. 137.) This Court observed in Affiliated Ute Citizens v. United States, 406 U.S. 128, 133 (1972) that "[i]nasmuch as the statute specifically employs the terms 'full-blood' and 'mixed-blood,' we feel compelled, for purposes of consistency and clarity, to do the same. No slur or offense whatsoever is intended."

[4]In 1954, Congress embarked upon another of the all-too-frequent shifts in policy which have characterized the history of Indian affairs. Known as "termination," the new policy included the transfer of Indian property to ordinary business corporations formed under state law, substitution of commercial banks for the United States in certain of the Government's trust duties, and the ending of the "special relationship" between the sovereign and its Indian wards rooted in Constitutional principles dating from the Northwest Ordinance of 1787. *See* U.S.C.A. Const., Ordinance of 1787, art. III, reenacted by Act of Aug. 7, 1789, 1 Stat. 51 (1789), and the U. S. CONST., art. I, § 8 cl. 3. The theory was that the so-called "Indian problem" could be ended by legislating changes in the Native American's economy and socio-legal status. The policy proved the most unpopular among the Indians, perhaps, of any ever imposed on them.

ties laws of the United States in connection with the sale of their capital stock in two range corporations. The range corporations in the matter at bar were simultaneously formed with and were similar to the holding corporation for mineral rights which was the subject of *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972) (*"Affiliated Ute"* herein). In most other respects, the facts herein are materially the same as in *Affiliated Ute.*

The pertinent provisions of the Termination Act were reviewed by this Court in *Affiliated Ute.* (406 U.S. 128, 135.)

The Respondent, First Security Bank of Utah, National Association (the "Bank") was selected by the Bureau of Indian Affairs ("BIA") for the protective purposes specified in Sections 13 and 22 of the Termination Act, *supra.* The chief executive officers of the Bank solicited the Secretary of Interior for those responsibilities over a period of several years (406 U.S. 128, 152) and the Bank was finally designated trustee as to all Indian minors and transfer agent for the corporations under arrangements this Court found in *Affiliated Ute* gave rise to fiduciary duties to all mixed-bloods. (406 U.S. 128, 154.)

The agreed facts were that the Bank sold the stock of the trust beneficiaries, *before the stock was issued*[5] and in disregard of higher offers from mixed-blood "members of

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[5]The Minutes of the Trust Committee of the Bank were stipulated. They recite that on September 13, 1960, a "meeting [was] called at the request of [the tribal attorney], in order that he might present to the Committee a proposal of the Ute Tribe to purchase as a block the shares of stock" of the two corporations. (Exhibit 158.) Nine days later, on September 22, 1960, the Trust Committee resolved to sell the shares of 147 of the 174 Indians subject to the trust, for the price of $1,100 per unit (*i.e.,* one share in each corporation). (Exhibit 166.) No negotiations over the price are reflected in the minutes and the price was as proposed by the purchaser, exactly. The stock certificates were not issued until October 20, 1960, and on the date of the resolution to sell, the corporations had not commenced doing business. *See* App. C, p. 36.

the tribe."[6] The sale was in disregard of the mixed-bloods' first refusal option (referred to by BIA, and herein, as a "private treaty" right) imposed by Congress in the Termination Act and contained in the plans. (*See* 25 U.S.C. § 677n, *supra.*, and at App. E, p. 149 and note 2, *supra.*)

Petitioners alleged that the parents of the trust beneficiaries were then forced to sell their own shares, or be left in the untenable position of being minority shareholders in a corporation controlled by the Tribe, whose interests under the Termination Act were necessarily divergent from their own. The Bank's participation in causing that effect was an alleged breach of trust as to all mixed-bloods.

The major focus in the court below was on the question of the value of some 172,000 acres of land, which was the sole asset of the two corporations. It is uncontroverted that the Bank sold the capital stock *without obtaining an independent appraisal of the land*[7] and the trial court so determined. (*See* App. C p. 88.) The court below nevertheless

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[6]The trial judge concluded that "one Margaret Sprouse, a mixed-blood," accepted the offer of the Bank to sell the shares of the trust beneficiaries (App. C, p. 47) and that she "was willing to pay as much as $1500 a unit, and had resources available to accomplish the purchase of a controlling interest in the corporations." (App. C, p. 93.) The stipulated evidence also established that, in addition to Mrs. Sprouse, Joseph Arthur Workman, a Director of Affiliated Ute Citizens ("AUC"), obtained financing in the amount of $500,000 for the purchase of shares (see AUC. Minutes, Exhibit 75, for Jan. 25 and Jun. 22, 1960; Exhibits 347, 379, 380 and 381); Calvin Hackford, a Director of one of the range corporations, obtained financing in the amount of $400,000 to purchase shares at amounts in excess of $1,100 per unit (Exhibit 75, *supra.*, Minutes for Jul. 12 ,1960); and other Indians testified at the time of trial that they were willing to pay as much or more for the shares but were not allowed to do so.

[7]The Trust Committee Minutes contain no reference to a request for an appraisal and the trust officer who testified at the trial indicated he had "no personal knowledge" of an appraisal. (Transcript of Proceedings, p. 855.) An affidavit of the Bank's former trust officer recites that "the price [was] 10% above the value at which the lands were appraised *in making a division of Tribal assets . . . .*" (Exhibit 163.) (Emphasis added.)

presumed that Petitioners were paid a fair price for the individual Indian's pro-rata share of the range, by reference to a disputed appraisal in the record conducted by the BIA several years prior to the sale. The BIA appraisal was never offered in evidence to establish value,[8] however, and was determined in Affiliated Ute not to be a fair market value appraisal for the purpose of sale.[9]

The court below ignored uncontroverted expert evidence, stipulated as to qualifications, on the value[10] of the land, and held that reliance on the out-dated appraisal was in "good faith." (*See* App. A, p. 21; App. C, p. 87 and App. D, pp. 131-32). In fact there was no evidence that the Bank ever saw the disputed appraisal[11] or communicated its contents to the trust beneficiaries. Moreover, the legislative history of the Termination Act indicates that Congress was

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[8]The so-called "Moore appraisal," as the BIA appraisal was known, was in evidence as part of the background of facts concerning the implementation of the land division under the Termination Act. No witness at trial testified that it reflected a fair value as of the date of sale or for that purpose.

[9]The findings of the trial judge in *Affiliated Ute* included the following, appearing at pages 503-04 of the Appendix on file with this Court:

> 6. In 1958 the Bureau of Indian Affairs, acting in cooperation with the Ute Indian Tribe, did undertake the appraisal of the assets represented by the capital stock of the two related corporations, Rock Creek Cattle Range Company and the Antelope Sheep Range Company. . . .
>
> The primary purpose of the appraisals on the two land corporations was to carry out the division of assets found in Public Law 671. *These surface appraisals were later used by the Tribe in determining what they would pay for the range stocks.* The appraisals *were not made for the purpose of fixing the value of the stock at the time of its sale to the Tribe.* (Emphasis added.)

[10]Richard Palmer, an appraiser who testified as an expert pursuant to a stipulation by the Bank as to his qualifications, testified that the 172,000 acres of land had a value of $2,456,000 on the date of sale, without regard for minerals, water, timber or hunting and fishing rights. (Transcript of Proceedings, p. 1004.) That value represents $4,400.20 for each unit, compared with the $1,100 for which they were sold. *Palmer's testimony was not controverted by any evidence.*

told six years earlier that the land had a significantly greater value.[12]

The trial court determined the facts consistently with Petitioners' allegations, but nevertheless dismissed Petitioners' claims. The Court of Appeals for the Tenth Circuit affirmed on the three legal bases cited above.

As regards Petitioners' securities law claims, the Court of Appeals held that the "range corporation stock was not a 'security.'" "Had the corporations been designed to profit the shareholders, either through distribution of earned income or by the enhancement of stock value, they could not have been organized under the Utah Nonprofit and Cooperative Association Act," (App. A, p. 15) the Court of Appeals reasoned. The Bank's sale of the stock did not involve "anything more than ministerial functions,"[13] and this Court's contrary conclusion need not be "followed." (App. A, pp. 10-11. *See also* App. C, p. 82.)

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[11]The assistant trust officer who handled the mixed-blood account testified that "I do not recall ever having seen a [sic] appraisal report concerning the real property which [the two corporations] owned." (Transcript of Proceedings, pp. 734-5.) The Tribal attorney answered "no" when asked by counsel for the Bank if the $1,000 per share figure he quoted to the Trust Committee was "based on the Moore appraisal." "The full-bloods . . . requested the Phoenix office to appraise" for them, the tribal attorney explained. (Transcript of Proceedings, pp. 1160-61.) The trust officer who testified at trial was only to "assume [that the Moore Appraisal] was with our files at that point in time." (Transcript of Proceedings, p. 890.)

[12]*See* S. Rep. No. 1632, 83d Cong., 2d Sess. at p. 6: "This proposed legislation involves division of . . . . land, estimated on the basis of 980,000 acres at $5 per acre, excluding subsurface rights which were not to be divided . . . $4,900,000." $1,100 per unit for the shares amounts to $539,000 for all of the stock issued which, divided by 172,000 acres, equals *$3.13 per acre.*" (Emphasis added.) Even the Bank and its witnesses agreed that land values *increased significantly* during that period of time.

[13]*Compare,* this Court's holding that the Bank "engaged in more than ministerial functions . . . And they were acts performed when they were obligated to act on behalf of the mixed-blood sellers." Affiliated Ute Citizens v. United States, 406 U.S. 128, 154 (1972).

As regards Petitioners' claims of breach of trust, the Court of Appeals held that "[t]he Bank's *interpolation* of the range land value from nearby property values and the expert testimony *was reasonable under the circumstances.*" (App. A, p. 21.) (Emphasis added.) That holding paraphrased the trial court's conclusion that the trustee's duties must be measured against the standards applied to the sovereign in related circumstances, and that the legal test is "good faith."[14]

Important issues not addressed by the Court of Appeals were (1) Petitioners' objections that neither the BIA appraisal, nor any other opinion evidence supporting the conclusions of value, was offered or received in evidence; (2) the contention that disregard of the private treaty right vested in Petitioners by the Termination Act, the Plan and Articles of Incorporation amounted to a rewriting of the Termination Act by BIA and (3) that the Bank's acquiescence in the disregard of the private treaty violated the trust duty to act on behalf of the mixed-blood shareholders (406 U.S. 128, 152) and to conserve the trust assets.

REASONS FOR GRANTING THE WRIT

This case presents important questions of national policy touching the lives of the entire Native American population of this country — questions rendered more acute by the calculated disregard of this Court's pronouncements on the application of the commercial law of trusts and securities to rights of Indians in the process of "termination." Any change in the protected status of the Native population,

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[14]In a separate opinion reproduced at App. D, the trial court cited United States v. Sioux Nation, 448 U.S. 371 (1980) and Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) holding that, because of sovereign immunity, the United States may abrogate its treaty obligations to Indians and held that they applied to the duies of the Bank herein.

whether Indian, Polynesian or Eskimo, will be impacted by this Court's work in these cases.

"Termination" (*i.e.*, ending the traditional and Constitutionally mandated special relationship between Native Americans and the United States, by legislating changes in their culture and economy, *see* note 4) remains a tragedy for the many thousands of American Indians already subjected to it. The spectre of its renewal is a recurring fear of those who have not yet fallen victims to the policy.[15] The decision herein magnifies their tragedy and validates their fears, by altering the entire fabric of Indian law and rejecting the customary requirement of straight dealing[16] with respect to Indians and their property. Terminated Indians are relegated to a second class status, to the extent that they are not accorded rights under federal securities laws or as a trust beneficiary equivalent to those applied for non-Indians.

Unless reversed, the decision of the Court of Appeals will result in the work of this Court in defining and safeguarding the rights of terminated Indians being ignored, at best, and perhaps destroyed altogether.

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[15]In 1933, Indian leaders from Wisconsin, Minnesota, Arizona and California, the Pueblo Council of 19 New Mexico reservations and the National Tribal Chairman's Association representing 154 member tribes, called for the "ouster" of Secretary of Interior Watt, Washington Post, Jan. 20, 1983, at A2, col. 1, after he said that reservations "fail to integrate [the Indians] into American social life.' Washington Post, Jan. 19, 1983, at A7, col. 1. In 1982, Indian groups throughout the nation were alarmed over a letter of Congressman James V. Hansen to Secretary Watt concerning a bill "which proposes termination, all supervision of Indians and tribes." S. L. Tribune, April 10, 1982, at A10, col. 1. Other examples occur yearly..

[16]*E.g.* Bacher v. Patencio, 232 F. Supp. 939, 941 (S.D. Cal. 1964) *affirmed, per curiam* 368 F.2d 1010 (9th Cir. 1966): "as Justice Holmes once said, people must turn square corners when they deal with their government. They must do the same when dealing with their government's wards."

I

THE DECLARATION OF THE COURT BELOW THAT IT WILL NOT "FOLLOW" A DECISION OF THIS COURT SHOULD BE REVERSED

The declaration of the Court of Appeals that it would not "*follow* the Supreme Court's decision in *Affiliated Ute Citizens v. United States*, 406 U.S. 128" (App. A, pp. 10-11) (emphasis added) threatens the integrity of the Common Law system. The court below declared that it would not do so, even though the same Indians, the same Bank, the same trust and fiduciary arrangements, the same legal issues, concerning companion corporations, simultaneously formed, by the same act of the same Indians, pursuant to the same clause of the same plans, adopted under the same Termination Act, for common purposes, with the same shareholders, whose stock was held under the same transfer agent arrangements, were being considered by the same judge of the same Court of Appeals. The declaration was a casual one, in an opinion marked "not for routine publication," which has the appearance of a frivolous treatment of rights this Court has found substantial.

A. *The Court Below Disregarded* Affiliated Ute, *and Intended to do so.*

The opinion below disregards two fundamental holdings of *Affiliated Ute*.

1. The holding of *Affiliated Ute*, with respect to trust, was that the Bank's acts "were acts performed when they were obligated to act on behalf of the mixed-blood sellers." (406 U.S. 128, 154.) This Court affirmed the trial court's finding of a fiduciary relationship[17] on the same facts in-

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[17]In addition to the conclusions of this Court quoted above the findings, of the trial judge in *Affiliated Ute* include the following, appearing at pp. 521 and 536 of the Appendix on file herein:

30. By reason of the said Agreement of December 31, 1958, the said

volved herein because "the bank itself had acknowledged, by letter to AUC in January 1958, that 'it would be our duty to see that these transfers were properly made.' " With respect to the sale of shares, this Court concluded further, " 'the bank [agreed that it] would be acting for the individual stockholders.' " (406 U.S. 128, 152.)

With the same documents before it, and with complete awareness of this Court's holding, the Court of Appeals nevertheless declared that "the Bank had *no fiduciary duty* to the mixed-blood adults." (App. A, p. 19.) (Emphasis added.) The only justification offered for denying a fiduciary relationship, on the same facts which led this Court to hold that one was present, was that different assets were being administered.

2. In the process of finding a fiduciary relationship in *Affiliated Ute*, this Court also reversed the Court of Appeals' finding of "no duty [under Rule 10b-5] on the part of this defendant to any of the plaintiffs as his acts were purely ministerial in character." (431 F. 2d 1337, 1346.) This Court pointedly declared that when the Bank facilitated the sale of Ute Distribution Corporation stock it was "engaged in more than ministerial functions" and its "acts

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Affiliated Ute Indian Trust Agreement of July 26, 1960, the said Boyden letter of July 22, 1959, and the implementation of the said agreements and instructions . . . said Bank an its agents . . . came into possession of personal and confidential information and financial records of mixed-bloods. . . .

31. . . . First Security Bank and its agents . . . were at all times pertinent to plaintiffs' claims fiduciaries in the sense that they occupied a position of trust and confidence with reference to . . . each of the mixed-blood stockholders of Ute Distribution Corporation.

* * *

15. The Bank occupied toward the mixed-blood Indians not coming within the express provisions of the trust if not the position of a fiduciary in the strict sense at least a duty to deal with and for the mixed-bloods in good faith and lawfully without purpose of overreaching or imposition.

were clearly within the reach of Rule 10b-5." (406 U.S. 128, 154.)

With that holding by this Court before it, the Court of Appeals nevertheless held that the Bank "was not engaged in *anything more than ministerial functions*" (App. A, p. 18) (emphasis added) when it facilitated, and what is more, actually conducted the sale of stock in these range corporations.

* * * *

The contradictions on both points seem careless, if not openly defiant of this Court's opinion. To declare, in any circumstances, that it will not "follow" a binding decision issued by this Court — one issued "because of the importance . . . for Indians whose federal supervision is in the course of termination" (406 U.S. 128, 141) — seems doubtful policy, indeed, for the Court below.

Granted we can distinguish the sheep and cows of these range corporations from the oil derricks of the Ute Distribution Corporation, and we can agree that the corporations managing them have different purposes. Is that distinction of any force, however, when the question is whether the Bank was a fiduciary or had a duty under Rule 10b-5? Justice Blackmun looked to the representations the Bank made to these Indians for the answer to those questions, not to the nature of the Ute Distribution Corporation. Preoccupation with the nature and/or assets of the companies whose stock was held by the trust, to the exclusion of an examination of the instruments giving rise to the fiduciary relationship and the federal policy under the securities laws, led the Court of Appeals to wholly disregard the plain holding of *Affiliated Ute*.

What is presented is not a case of careful distinction of a prior opinion on its facts.

The same judge writing for the Court of Appeals herein authored the opinion this Court reversed in *Affiliated Ute*. His rationale herein is a mere rearticulation of the precise terms this Court rejected in *Affiliated Ute*. His disregard of this Court's prior opinion was calculated, for it was prefaced with the *quare* at App. A, p. 10, "[a]t the outset, we consider the plaintiffs' contention that this court is *bound . . . to follow*" *Affiliated Ute*. (Emphasis added.)

B. *Res Judicata and Collateral Estoppel Apply in This Case.*

The declaration of the Court of Appeals that "[b]oth doctrines [of collateral estoppel and res judicata] require an identity of factual issues in the two cases" is plain error. It ignores, moreover, recent pronouncements of this Court.

1. With respect to res judicata, this Court has recently reaffirmed that "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating *issues that were or could have been raised in that action.*" (Emphasis added.) *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981), citing *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1877). The rule thus applies to *issues*, between the parties or their privies, and not merely to *facts*. The "facts" surrounding the water claims of the Indian intervenors in *Arizona v. California*, ... U.S. ....., 51 U.S.L.W. 4325 (U.S., Mar. 30, 1983) had plainly not been litigated, but this Court nevertheless applied *res judicata* and declared that "[f]inality principles would become meaningless if an adversarially-determined *issue* were final only if the equities were against revising it." *Id* at 4331. (Emphasis added.) The "issue" was final, moreover, even though the Indians intervened in the *same action* pursuant to a *retention of continuing jurisdiction*.

The *issues* of "trust" and "duty" were clearly litigated in *Affiliated Ute*. Just as clearly litigated was the *issue* of whether the BIA appraisal was evidence of fair market value. Respondent Bank was a party to *Affiliated Ute*, as was Petitioner Anita Reyos.

This Court said in *Moitie* that "'[s]imple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied," for:

> The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case . . . . It is a rule of fundamental and substantial justice, "of public policy and private peace," which should be cordially regarded and enforced by the courts . . . .

Op. cit. supra at 401, quoting from *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917).

2. Even in cases not involving the same parties or privies, collateral estoppel bars relitigation of the same *issues*. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332-33 (1979). The conditions of *Parklane* are fully satisfied herein. Here, as in *Parklane*, "the contemporary law of collateral estoppel thus leads inescapably to the conclusion that [the Bank is] collaterally estopped." *Id.* at 332-33.

• • • •

The Court of Appeals nevertheless declared that "the plaintiffs' claim that we are bound by collateral estoppel and res judicata [is] unpersuasive." (App. A, p. 11.) The reason advanced, *viz.*, that there was different stock, of corporations with different purposes, and different acts, simply fails to address the *issues* previously litigated. Those differences necessarily are present when the prior decision is applied to other "Indians . . . in the course of termina-

tion," or to the myriad other cases involving non-Indians having no remote connection to the facts herein, which have properly "followed" *Affiliated Ute.*

C. *The Intent of the Prior Mandate is Plain and Should Be Enforced.*

Since the days of Chief Justice Taney, and before, it has been held that "when the direction contained in the mandate is precise and unambiguous, it is the duty of the Circuit Court to carry it into execution, and not to look elsewhere for authority to change its meaning." *West v. Brashear,* 39 U.S. 51, 54 (1840). The situation herein is similar to *Tyler v. Magwire,* 17 Wall. [84 U.S.] 253, 282 (1872), where the lower court was reversed a second time because it "entered a new decree . . . which in effect evades the directions given by this court, and practically reverses the judgment and decree which the mandate directed them to execute." Appropos such holdings, Justice Rehnquist recently declared that the "language used by this Court half a century ago is even more compelling in view of today's crowded dockets." *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 401 (1981).

In modern times, this Court has prevented calculated efforts to evade its mandate by ordering the Judicial Council to "assign a different District Judge to hear the case." *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,* 386 U.S. 129, 142-43 (1967). The Court of Appeals' decision is based on no issues other than the "trust" and "duty" questions, both of which were decided in *Affiliated Ute.* This Court should reverse, or at least remand with directions to "follow" *Affiliated Ute.*

II

REVIEW SHOULD BE GRANTED TO RESOLVE CONFLICTS WITH THIS COURT AND AMONG THE COURTS OF APPEALS ON THE APPLICATION OF PROVISIONS OF STATE CORPORATE LAW TO THE FEDERAL SECURITIES LAWS

The opinion of the Court of Appeals presents conflicts with decisions of this Court, and with other Courts of Appeals, on the application of the federal securities laws *vis-a-vis* provisions of state corporate law. That is so because the sole justification offered by the court below for the conclusion that the capital stock given to Petitioners, in exchange for their equity in 172,000 acres of land, was not a "security," was the claim that provisions of state corporate law prohibited "enhancement of stock value." (App. A, p. 15.) In point of fact, Utah law says no such thing,[18] but what is important to this Petition is the issue of supremacy of federal law.

A. *The Decision Below Conflicts with Decisions of this Court on the Supremacy of Federal Law.*

To the extent that it allows provisions of state law to control the effect of the federal securities laws, the decision below ignores the time-honored and recently reaffirmed policy of this Court. *SEC v. W. J. Howey Co.*, 328 U.S. 293, 298 (1946) held that form may not exalted over substance. Precise to the issue, this Court declared in *Tcherepnin v. Knight*, 389 U.S. 332, 337 (1967), that "[w]hile Illinois law gives legal form to the withdrawable capital shares held by the petitioners, *federal law must govern* whether shares

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[18]Utah Code Ann. § 16-6-21 provides that the *corporation may not be* formed for pecuniary profit. It does not say that there may not be an "enhancement of stock value."

having such legal form constitute securities under the Securities Exchange Act," (emphasis added) citing *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 (1959). This Court's threshold decision in *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943) held that "it is not inappropriate that . . . offerings be judged as being what they were represented to be."

The Court of Appeals did not inquire into whether the shares could produce a profit, whether the shares were imposed upon these Indians with the promise that they would do so, whether the shares appreciated in value or whether the mixed-bloods were promised there would be a market for the trading of the shares. Lacking, also, was any inquiry into the availability of effective alternate systems for the protection of investors, which this Court has consistently required in those limited situations where exemptions have been implied. *See Marine Bank v. Weaver*, 455 U.S. 551 (1982). *Accord, SEC v. National Securities, Inc.*, 393 U.S. 453 (1969); *SEC v. United Benefit Life Insurance Co.*, 387 U.S. 202 (1967); *SEC v. Variable Annuity Life Insurance Co.*, 359 U.S. 65 (1959).

This Court has recently reaffirmed its frequently repeated dictum "that securities laws combating fraud should be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" *Herman & McLean v. Huddleston*, ... U.S. ....., 51 U.S.L.W. 4099, 4102 (U.S., Jan. 24, 1983) quoting from *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

The record is clear and uncontroverted that, had the Court below undertaken *any* of the multiple inquiries required, these shares had *each* of the attributes this Court has held impart "security" status to an instrument or arrangement. The record is equally clear and uncontroverted that shares in these corporations were distributed in the

process of *removing* the protections previously afforded by BIA under the Indian laws.

B. *The Decision Conflicts with Decisions of the Courts of Appeals for the Second, Sixth, Seventh, and Ninth Circuits on the Effect of State Law.*

Other courts of appeals have uniformly given effect to this Court's declaration of federal supremacy in *Tcherepnin*. They have uniformly rejected the notion of reverse or state supremacy applied herein.

The Court of Appeals for the Ninth Circuit declared that "Federal law governs . . . . the question of when a sale is complete for purposes of section 16(b) [and] must be decided so as to foster the goals of the federal legislation rather than under concepts of when title passes under state law." *Provident Securities Co. v. Foremost McKesson, Inc.*, 506 F. 2d 601, 606 (9th Cir. 1974), *cert. denied*, 423 U.S. 1077 (1976). The Court of Appeals for the Sixth Circuit declared that "[t]he definition of ["purchase" and "sale" under the Exchange Act] is a matter of federal law . . . not to be limited or defined solely in terms of commercial law of sales and notions of contractual rights and duties." *Champion Home Builders Co. v. Jeffress*, 490 F. 2d 611, 615 (6th Cir. 1974), *cert. denied*, 416 U.S. 986 (1974). The Court of Appeals for the Second Circuit held that "[t]he SEC is right in saying we should decide the issue [of the meaning of the term "purchase"] as one of federal law, even though a Delaware court construing its corporation laws might come to a different conclusion." *SEC v. Sterling Precision Corp*, 393 F. 2d 214, 217 (2d Cir. 1968). To the same effect *see Bershad v. McDonough*, 428 F. 2d 693, 696 (7th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971).

The decision of the court below is at odds with the foregoing decisions. That conflict is complete, for the Court of

Appeals made no inquiry other than its reference to the state law.

C. *The Court Below Misapplied this Court's* Foreman *Decision.*

Though the Court of Appeals effected comfort from *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837 (1975), it is clear that it failed to apply the holding of that case. *Forman* did not hold that provisions of state law could be relied upon to exempt any arrangement from the scope of federal regulation. To the contrary, *Forman* reaffirmed the "basic principle that has guided all of the Court's decisions in this area: '[I]n searching for the meaning and scope of the word 'security' in the Act[s], form should be disregarded for substance and the emphasis should be on economic reality.' *Tcherepnin v. Knight,* 389 U.S. 332, 336 (1967). *See also, Howey, supra,* 328 U.S., at 298." (421 U.S. 837, 848).

This Court gave little weight, if any at all, to the formation of the housing cooperative involved in *Forman* under the nonprofit provisions of state law. Memberships in the cooperative were held not to be a "security" only because a detailed analysis of the terms of the offering led to the conclusion that they did not possess the attributes normally associated with stock. In doing so, this Court was emphatic that there must be an inquiry into the elements of the federal definition:

> . . . do they [possess] the other charactertistics traditionally associated with stock: they are not negotiable; they cannot be pledged or hypothecated; they confer no voting rights in proportion to the number of shares owned; and they cannot appreciate in value. (421 U.S. 837, 851.)

Neither the trial court nor the Court of Appeals conducted such an inquiry herein. It could not be concluded, in the

words of *Forman*, that these Indians "purchase[d] a commodity for personal consumption or living quarters for personal use," (421 U.S. 837, 858) for the minutes of the trust committee recited that "very few lived in the Roosevelt area and that many lived outside the State of Utah," and that "[i]t was evident that there was little chance that any of these could make personal use of the grazing rights . . ."[19] Substantially all of them, moreover, were compelled to sell by the practices alleged, in most cases before a single grazing season had arrived and before the stock was issued. Precisely opposite to the situation in *Forman*, where "purchasers [were] inform[ed] that they will be unable to resell," (421 U.S. 837, 854), it was represented to Congress[20] and stipulated as a fact that these Indians were assured that "individuals can trade their shares" and could "give your interest in your distributive share to get more shares in the cattle and sheep operations."[21]

The trial judge acknowledged these facts (*see* App. B, p. 36) as did the Court of Appeals with its declaration that "[t]he corporations were formed to convert the undivided interests of each mixed-blood *into something which could be easily transferred* and something which could be used as an indicia [sic] of ownership." (App. A, p. 13.) (Emphasis added.) The Court of Appeals nevertheless failed to apply the facts as this Court directed in *Forman*.

These range corporations and the distribution corporation this Court considered in *Affiliated Ute* are precisely

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[19]Exhibit 165, stipulated by the parties.

[20]"[W]e know there are a whole group in Salt Lake and other places that will just want their interest out. . . . .We also know that there are quite a few that have much more cattle than their interest will support. So these people have to arrange to buy out the other people that will want to sell." *Hearings on S. 3532 and H. R. 9398, before the Senate Committee on Interior and Insular Affairs*, 83d Cong., 2d Sess. (1954), p. 43. (Exhibit 2A.)

[21]*See* Minutes of Meetings of the Affiliated Ute Citizens for Dec. 8, 1958, Jan. 12, 1959, Mar. 7, 1959, and Apr. 7, 1959, Exhibit 75; Exhibit 429.

the same when measured by the elements this Court defined in *Forman*. All three were negotiable. Limitations on pledge and hypothecation were the same. They all had precisely the same voting rights. All three appreciated in value. The "common enterprise" element[22] was in fact *less* present in the distribution corporation than with these range corporations.[23] All three have the very same attributes (other than formation under the "nonprofit" provisions of state law) with virtually identical provisions in their charters. In truth, the court below stood this Court's holding on its head, for *Forman* held that the definitional sections of the securities laws may not be given literal effect. The court below nevertheless gave the "non-profit" definition of state corporate law literal effect, and applied it in such a way it overrides federal law.

D. *The Policy of the Federal Securities Laws was Ignored.*

To deny the coverage and reach of the federal securities laws to corporations not fitting the classic pattern, or whose commercial objects are arcane, exempts an important segment of industry from needful regulation mandated by Congress in 1932-34. It also ignores the entire history of legal development surrounding those remedial measures, which have stressed the flexibility of the securities laws. *E.g.*, *Affiliated Ute*. That, in truth, was the teaching of *SEC v. Howey Co.*, 328 U.S. 293 (1946) and its progeny; the teaching of the line of cases defining "fraud" under the federal securities laws, of which *Affiliated Ute* forms an important part, *e.g.*, *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963); and the teaching of those recent cases con-

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[22]Discussed in, *e.g.*, SEC v. W. J. Howey Co., 328 U.S. 293 (1946).

[23]That is so because the distribution corporation involved in Affiliated Ute held a mere 27% of the undivided mineral estate, and voting with the Tribe was *proportional* – thus leaving the Tribe in absolute control. *See*, 25 C.F.R. § 178.5.

cerned with the frame of mind of the alleged wrongdoer, *e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). The Court of Appeals would ignore that history of development and force the definition of a "security" into a formalism this Court has consistently rejected.

III

REVIEW SHOULD BE GRANTED TO CONFIRM TRUST PROTECTIONS PROVIDED TO AMERICAN INDIANS BY AN ACT OF CONGRESS

The lower court's handling of the inter-related trust/Indian law issues threatens the rights of all dependent Native populations, whether in trust status, in experimental programs like termination or in protectorates like the Pacific or Caribbean regions. That effect follows from (1) the assumption that the Termination Act was a mandate from Congress to abandon the historic policy of protection of Indians and their property and (2) the reduction of the question of breach of trust to the "good faith" question.

With full knowledge, common to themselves and to any other thinking observer of the American scene, that commonly-held land-base is *the fundamental ingredient* of the Indian way of life, the Bank implemented the sale of Petitioners' only remaining land for no consideration other than the monetary one; and failed to require a *current* monetary value even at that. Correlatively, every sensitive observer knew that the dollar was the *least* important element to the Indian, but the Bank failed to even consider the unique cultural values its Indian wards attach to land ownership. The language of the termination act, and the trust agreement itself,[24] directed preservation of the mixed-bloods' as-

[24]The trust agreement, Exhibit 98, provided in Article II:

> The trustor hereby declares that it is his purpose in establishing this trust *to give effect to the objective of the Government of the*

sets. Moreover, Congress directed assistance to the mixed-bloods in adjusting to their new status, and conferred rights on them equivalent to non-Indian citizens after termination. All of those protections were effectively nullified.

If rights of Indians can be thus eliminated in a social experiment such as termination, then the same threat will follow *any* effort to devise new policies for Native Americans *anywhere*. Programs for the allotment of Indian lands in severalty, competency laws and proceedings, as well as tribal leasing programs, are among the diverse policies and programs where the precedent of this case poses tragic consequences.

A. *The Conclusion that Congress Abandoned the Protections for Indians and their Property Conflicts with Opinions of this Court and the Court of Claims on the Effect of Termination.*

The Court of Appeals affirmed, without comment, the conclusion of the trial judge that in termination "Congress was pursuing the removal of trust restrictions from the management of Indian property . . . rather than the tightening of restrictions and redoubling of supervision by a trustee, be it government or bank." (App. C, p. 133.) The Court of Appeals thus declined to consider the protection of any rights under Indian law, including the "private treaty" right. The holding reverses the policy towards Indians mandated by the Commerce Clause (*see* U. S. Const.,

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United States to terminate the governmental supervision of the members of the mixed-blood members of the Ute Indian Tribe in a manner which will provide for those beneficiaries seeking and able to take advantage of it, every opportunity for assistance in becoming self-reliant individuals, and which will protect them against the improvident dissipation or loss of their assets. [Followed *by provisions directing* assistance in acquiring "real property for farm or business."] (Emphasis added.)

art. I, § 8, cl. 3) and having its origin in Article III of the Northwest Ordinance of 1787 [reenacted at 1 Stat. 51 (1789)]. While Congress may have that power, the courts err when they *imply* such a purpose.

The holding that Congress *reduced* the Indians' rights to protections in the termination laws conflicts, moreover, with numerous recent decisions of the Court of Claims, which has become the most important forum for the adjustment of Indian rights. The Court of Claims has recently held, in a related context, that "once having . . . assumed the task of terminating the [Creek] Nation's mode of life including its manner of holding its lands . . . it was incumbent upon the United States to take every conceivable precaution to insure that the Creek Nation did not suffer the loss of any of its lands." *Yanktown Sioux Tribe v. United States*, 623 F 2d 159, 164 (Ct. Cl. 1980). When the Indians of the Northwest claimed that termination amounted to an implied taking of their lands, the Court of Claims held that "the Congressional history indicates otherwise."

> It shows that Congress was concerned with and aware of all of the Indians' interests and rights, and tried to satisfy them without harm to either the withdrawing or remaining members . . . .

Klamath and Modoc Tribes v. United States, 436 F 2d 1008, 1020-21 (Ct. Cl. 1971), *cert. denied*, 404 U.S. 950 (1971).

B. *The "Private Treaty" Protection Provided by Congress in the Termination Act was Ignored by the Bank, and Changed by Administrative Interpretations of BIA.*

The principal method directed by Congress to assure that, in the words of *Yanktown Sioux*, the mixed-blood group "did not suffer the loss of any of its lands," while they adjusted to a new social/economic status for which everyone knew they were poorly equipped, was the so-called

"private treaty,"[25] (*See* U.S.C. § 677n, *Supra.*, and App. E, p. 149) a simple option for the individual "members" in either group to acquire enough rights to operate a farm or ranch.

Administration of the private treaty by the Bank, in its capacity as trustee and transfer agent, was in fact the principal fiduciary duty contemplated by Justice Blackmun's holding in *Affiliated Ute* at 406 U.S. 128, 152:

> The bank itself had acknowledged, by letter to AUC in January 1958, that "it would be our duty to see that these transfers were properly made" and that, with respect to the sale of shares, "the bank would be acting for the individual stockholders."

Nevertheless, the agreed facts and the findings of the trial judge are that the Bank purposefully acted to nullify Petitioners' private treaty right.[26] The Bank did so because the BIA had decided to alter the meaning of the private treaty so that the Tribe (which was still under BIA protection) could become a purchaser.[27] That necessitated altering the

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[25]The "private treaty" is discussed in some detail in the findings of the trial judge at App. B, pp. 36-42. The regulations originally proposed that "[a]ny mixed-blood member of the tribe desiring to dispose of his interest in any of the lands acquired under the terms of this act to any member of the tribe may do so by private treaty . . . ." (*See* Exhibit 109.)

[26]The findings of the trial judge are at App. C, pp. 84-85:

> . . . it is fairly certain that the Bank knew that the tribe wanted control, had the authorization of the United States to acquire control, and that Interior and B.I.A. interpretations of the Termination Act and the regulations promulgated thereunder cleared the way for the acquisition of control.

[27]The trial judge specifically determined at App. C, pp. 39-40, that

> The tribe was not a "member of the tribe" and thus could not initially purchase range company shares but could purchase only after an offer had been made to individual mixed-bloods and individual full-bloods.

The trial judge further found at App. C, pp. 39-42 that the BIA acted to change the plain meeting of the words used by Congress.

private treaty Congress granted only to individual "members," so that "member" meant "Tribe" and *not* its individual members. BIA resolved to make that change without the knowledge or approval of Congress, by administrative interpretation.

The Bank then acceded to BIA instructions "to proceed with the purchase by the tribe." (App. C, p. 49.) Purchase by the Tribe did not satisfy the purpose of the private treaty, however, which was to enable individual Indians in both groups to assemble an economic unit. To the contrary, it defeated that purpose.

Thoughtful persons of good will may differ in their opinions about the wisdom of BIA's rewriting the private treaty. As the termination policy proved to be a failure, and it became clear that segregating the Utes' property rights would be as destructive as it had been to the Five Civilized Tribes under the allotment policy, it is understandable that BIA wanted to acquire the mixed-bloods' share of the range and restore it to a communal status. The mixed-bloods were no longer the responsibility of BIA, and at that point in time had the Bank to look after their interest.

It was for Congress, however, and not BIA to make the determination to change the private treaty. This Court has been clear that:

> [t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is "'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'"

Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976) quoting from *Dixon v. United States*, 381 U.S. 68, 74 (1965) and *Manhattan General Equipment Co. v. Commissioner*,

297 U.S. 129, 134 (1936). To the same effect, *see Ballinger v. Frost*, 216 U.S. 240, 249 (1910):

> Whenever, in pursuance of the legislation of Congress, rights [of an Indian] have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of Congressional legislation.

The Court of Claims has held that failure to follow the statutory procedure in the termination of a tribe's rancheria status is a breach of fiduciary duty. *U. S. v. Duncan*, 667 F. 2d 36 (Ct. Cl. 1982), *petition for cert. filed*, 51 U.S. L.W. 3023 (U.S. Mar. 19, 1982). Petitioners' claims that failure to entertain the competing offers, or to preserve the private treaty, amounted to a breach of trust were nevertheless brushed aside by the Court of Appeals with the cryptic observation that "we can see no useful purpose in considering such an offer . . . in view of the rejection of [the Margaret Sprouse' bid] and the reasons for its rejection." (App. A, p. 23.)

In response, we echo this Court's comment in *Arenas v. United States*, 322 U.S. 419, 427 (1944): If the Indians were not to be afforded protections under the Act, and those protections were to be available only to the Tribe, why send government agents to the reservation to hold out that promise? Why the elaborate system of notice, to the individual members, of each proposed sale and of the first refusal option? (*See* App. F, p. 157.) Why the specific provisions concerning terminated Utes "in need of assistance" if Congress had no intention to protect them?

As this Court has said in a related context "[t]he statute's focus on the individual is unambiguous" and "the

question of fairness to various classes affected by the statute [such as the Tribe] is essentially a matter of policy for the legislature to address." *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978). As the Court of Appeals for the Ninth Circuit has said:

> In his dealing with the Indians, the Secretary of Interior does not have the power of an asiatic potentate or even of a benevolent despot. He, like his wards themselves, is subject to legislative restrictions.

United States v. Arenas, 158 F.2d 730, 747-48 (9th Cir. 1947), *cert. denied*, 331 U.S. 842. *Cf. United States v. Topco Associates, Inc.*, 405 U.S. 611 (1972); *Arizona v. Maricopa County Medical Society*, 102 S. Ct. 2466 (1982).

The Bank was to have acted in the interest of the mixed-bloods. (406 U.S. 128, 152.) It abandoned that clear fiduciary duty when it cooperated in the elimination of the private treaty for the benefit of the Tribe, which was not a trust beneficiary.

C. *Presumption of Good Faith, in Lieu of "the punctillio of an honor the most sensitive," Denies the Protections of Trust Law to Petitioners and Their Property and Does So Because They are Indians.*

The Court of Appeals responded to Petitioners' objection that there was no evidence to support the conclusion that $1,100 per unit represented the fair value of their respective interest in the range by holding, that "[t]he trial court found that the Bank did not act *imprudently* in utilizing the Moore appraisal." (App. A, p. 2.) (Emphasis added.)

The effect was to substitute the ordinary requirement of *evidence* of *value* for a test in which the fiduciary is excused if it acted in "good faith." The "good faith" test, moreover, was applied as a presumption, for no evidence

was taken at trial or cited by the Court of Appeals supporting the conclusion.

The trial court directly responded to Petitioners' objections in a written opinion declaring that if the United States had executed similar sales, "the appropriate inquiry [would be] whether the government had made 'a good faith effort to give the Indians full value of their lands' " (App. D, p. 132.) "[E]ven under the standards made applicable to the United States," the trial judge continued, "the disputed transactions were [not] beyond the lawful exercise of the bank's powers," *Id.* pp. 132-133, citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903) and *United States v. Sioux Nation*, 448 U.S. 371, 416 (1980).

The holding is clear error and a destruction of trust protections available to American Indians, as follows:

1. The holding is a misapplication of *Lone Wolf*, having the effect of extending elements of sovereign immunity to an ordinary commercial trustee if the trust beneficiaries are Indians. Justice Blackmun was clear in *Sioux Nation* that the "good faith" standard applied only because of the implications of sovereign immunity.[28] When Mr. Justice White wrote in *Lone Wolf that* "[w]e must presume that Congress acted in perfect good faith in the dealings with the Indians, and that the legislative branch of the government exercised its best judgment in the premises," he did not do so because the petitioners were Indians, as the courts below assumed — but because the United States was sovereign and the question was a "political" one for Congress. There is no reason to believe that when Congress directed

[28]Justice Blackman explained that the views of the Court in Lone Wolf were based, in part, on a holding that "Congress possessed full power in the matter," • • • [but] "where Congress waives the Government's sovereign immunity . . . there would be far less reason to apply Lone Wolf's principles of deference." 448 U.S. 371, 412-14.

the establishment of trusts it intended the trustee to have the powers of sovereign.

2. The substitution of a "good faith" standard, merely because Petitioners are Indians, denies them the protection of the law of trusts. The classic standard of care for commercial trustees is that announced by Justice Cardozo, of "[n]ot honesty alone, but the punctillio of an honor the most sensitive." *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546 (1928). This Court has consistently applied that standard. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963). *See also, Herman & MacLean v. Huddleston*, ___ U.S. ___, 51 U.S.L.W. 4099 (1983) and *United States v. Nattalin*, 441 U.S. 768 (1979).

The "good faith" standard applied by the Court of Appeals is, moreover, a misstatement of the standard even in cases involving the United States as trustee, where the question of immunity is not an issue. In that event, "all sales must 'be based upon a consideration of the needs and the best interests of the Indian owner and his heirs'" and they are entitled to "the greatest appropriate revenue which should have been obtained." *U. S. v. Mitchell*, 664 F. 2d 265, 271 (Ct. Cl. 1982) *cert. granted*, 50 U.S.L.W. 3963 (U.S. Jun. 7, 1982). The precise standard of "reasonableness" applied by the Court of Appeals herein has been rejected in that context:

> Defendant's theory is that . . its actions were reasonable, and not a breach of trust. . . . that theory must fail . . . the standard of duty for the United States is not mere "reasonableness," but the highest of fiduciary standards.

U. S. v. Duncan, 667 F. 2d 36 (Ct. Cl. 1982), *petition for cert. filed*. 51 U.S.L.W. 3023 (U.S. Mar. 19, 1982). "[A] showing that the value realized from the trust property was so far below its fair market value as to constitute

fraudulent conduct, gross negligence, or other breach of fiduciary duty will suffice without more to establish the trustee's liability" *Coast Indian Community v. United States*, 500 F. 2d 639, 653 (Ct. Cl. 1977).

• • • •

Lone Wolf and *Sioux Nation* simply have no relevance to the inquiry. Application of those cases herein has the effect of imposing new and different trust standards where the trust beneficiary is an Indian and extending the powers of sovereign immunity to an ordinary commercial fiduciary established for Native Americans. Nothing in the termination law would even suggest such a result, and it is a firmly established doctrine that elimination of the protective provisions of Indian law may not be lightly inferred. *E.g.*, *Menominee Tribe v. United States*, 391 U.S. 404 (1968) and cases collected there. It is irreconcilable, as well, with the historic, Constitutional, policy of this Nation towards Indians dating from the Northwest Ordinance of 1787.

D. *A Presumption of Value Violates Fundamental Due Process.*

The lower court's handling of the interrelated questions of breach of trust and value has the further effect of denying these Indians the fundamentals of due process, for these Indians must accept a *presumption* — and a presumption not even of *value*, but of "good faith." That presumption, moreover, was based upon outdated appraisals, prepared for vastly different purposes, which are not even in evidence.

Yet, with the uncontroverted testimony before it, stipulated as to its qualifications, establishing a value in excess of 400% of the amount Petitioners were paid,[29] the court below declined to address the problem.

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[29]See note 10, *Supra*.

CONCLUSION

Because of the Court of Appeals decided no issues other than that the Bank had no "duty" under Rule 10b-5, and that there was *no* "fiduciary relationship" between the mixed-bloods and the Bank, *both* of which were decided otherwise by this Court in *Affiliated Ute*, the decision of the Court of Appeals should be summarily reversed.

In the alternative, this case should be remanded to the trial court, with or without hearing, for further proceedings consistent with *Affiliated Ute*.

Any other result threatens the integrity of the judicial system.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

RANDOLPH C. HACKFORD, LAWANNA KAY,
REED THOMPSON, ALLEN D. REYOS
AND ORANNA BUMGARNER MOOSMAN,
FOR THEMSELVES AND FOR
AND ON BEHALF OF ALL OTHER
PERSONS SIMILARLY SITUATED,
PETITIONERS,

V.

FIRST SECURITY BANK OF UTAH, N.A.,
DEFENDANT.

APPENDIX

OF OPINIONS, STATUTES AND REGULATIONS
INVOLVED IN THE PETITION FOR CERTIORARI
IN RANDOLPH C. HACKFORD, ET AL.
V. FIRST SECURITY BANK OF UTAH, N.A.

JUNE 19, 1983

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APPENDIX A

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

81-1863

RANDOLPH C. HACKFORD LAWANNA KAY REED THOMPSON, ALLEN D. REYOS and ORANNA BUMGARNER MOOSMAN, for themselves and for and on behalf of all other persons similarly situated.	)	Appeal From The United States District Court For The District Of Utah Central Division (D.C. Civil No. C 75-278)
Plaintiffs-Appellants	)	
v.	)	
FIRST SECURITY BANK OF UTAH, N.A.,	)	
Defendants-Appellees.	)	

Parker M. Nielson (Paul T. Moxley, with him on the brief), Salt Lake City, Utah, for Plaintiffs-Appellants.

Thomas A. Quinn of Ray, Quinney and Nebeker (James S. Jardine, with him on the brief), Salt Lake City, Utah, for Defendant-Appellee.

Before SETH, Chief Judge, DOYLE, Circuit Judge, and BOHANON, District Judge*.

* Honorable Luther L. Bohanon, United States Senior District Judge for the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

SETH, Chief Judge.

The plaintiffs appeal the trial court's determination that the defendant, First Security Bank of Utah, did not breach any fiduciary duties it may have had to them and did not violate the provisions of the Securities and Exchange Act of 1934. The facts of this case are not disputed and were set forth in detail by the trial court in its memorandum opinion at 521 F. Supp.

541 (D. Utah). We review here only those facts pertinent to this appeal.

In 1954, Congress passed the Ute Indian Supervision Termination Act, 25 U.S.C. § § 677-677aa, which classified as "full-blood" any member of the Ute Indian tribe who possesses one-half degree of Ute Indian blood and is in excess of one-half Indian ancestry. "Mixed-bloods" were defined in the Act as those members of the tribe which did not possess sufficient Ute or Indian blood to fall within the full-blood class or those full-bloods who chose to become mixed-bloods. We use the term "mixed-blood" because it is used in the Act and in opinions in cases arising under the Act. Affiliated Ute Citizens v. United States, 406 U.S. 128, 133 n. 3. The purpose of the Act was to allow for the partition and distribution of the assets of the Ute tribe between its mixed-blood and

full-blood members, and to terminate the federal supervision over the mixed-bloods' property. 25 U.S.C. § 677.

When the tribal assets were partitioned, the 490 mixed-bloods received, among other things, 172,000 acres of range land. The Termination Act provided that all assets assigned to the mixed-bloods were to be distributed among the members of that group. To accomplish this, the mixed-bloods formed two nonprofit grazing corporations under the laws of Utah, the Rock Creek Cattle Corporation and the Antelope Sheep Range Corporation. Each mixed-blood then surrendered his undivided interest in the range land and received one share in each corporation. The two shares, one in each of the range corporations, are referred to as a unit. Ownership of a share entitled its holder to graze a specified number of cattle or sheep on

parts of the range land during certain months. The articles of incorporation of each corporation designated the defendant Bank as the transfer agent of the range corporation shares.

The Secretary of the Interior was directed by the Termination Act to protect the interests of minors and incompetents. The Secretary appointed the Bank as the trustee of the assets of these particular mixed-bloods. The trust agreement gave the Bank sole discretion to manage the trust assets in the best interests of these beneficiaries. The full-bloods became interested in acquiring the mixed-bloods' stock in the range corporations. Federal regulations provided that any shareholder in the range corporations who wished to dispose of his interest had to offer his stock first to the remaining mixed-bloods and the full-bloods in a prescribed manner.

If the offer was not accepted by a member of the tribe, the offeror had six months to sell the shares to whomever he desired at any price greater than or equal to his initial offering price. 25 C.F.R. § 243 (1966). The full-bloods received permission from the Bureau of Indian Affairs to expend tribal funds to bid on the stock of the minors and incompetents held in trust by the Bank.

The full-bloods sought to purchase from the Bank the range corporations' stock at $1,100 a unit. The price mentioned was substantially in excess of any unit price previously paid to any shareholder. The Bank's trust committee circulated questionnaires to 116 of the trust beneficiaries or their parents asking whether they wished to accept the full-bloods' proposal. The Bank thereafter offered to sell 147 units of the stock it held to the full-bloods at not

less than $1,100 a unit. The units offered were those where the beneficiary or his parent had not expressly asked that the shares be retained. Under the regulations, the offer was made to the individual mixed-bloods and full-bloods as well as to the tribe. The offer was accepted by the full-bloods on October 14, 1960 and by Margaret Sprouse, a mixed-blood, on October 17, 1960. After an investigation the Department of Interior determined that Mrs. Sprouse was acting on behalf of non-Indian interests and disqualified her bid. the 147 units were then sold for $1,100 each to the full-bloods.

The full-bloods continued to purchase shares in the range corporations at $1,100 per unit from the Bank and others until 1963. By then the full-bloods had purchased all but 48 units of which nineteen were still held in trust by the Bank. The

corporations were thereafter dissolved and the mixed-bloods who had not sold their shares to the full-bloods received individual interests in the grazing land.

The plaintiffs, who represent a class of mixed-bloods comprising all express trust beneficiaries whose stock was sold to the full-bloods, allege that the Bank violated Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, certain disclosure provisions under the Act, and the Bank's state statutory and common law fiduciary duties to them.

The plaintiffs also claim to represent a larger class comprising mixed-bloods whose stock was not held in trust by the Bank but who sold their stock as individuals to the full-bloods. These persons allege that the Bank breached its fiduciary

duty to them and defrauded them in violation of Rule 10b-5.

The trial court found that the Bank owed no fiduciary duty to the larger class, had not violated the provisions of federal securities law, and had not breached its fiduciary duties to the express trust beneficiaries. The plaintiffs appeal all of the trial court's holdings.

At the outset, we consider the plaintiffs' contention that this court is bound by the doctrines of collateral estoppel and res judicata to follow the Supreme Court's decision in Affiliated Ute Citizens v. United States, 406 U.S. 128. That case also arose under the Ute Indian Supervision Termination Act, and dealt with the division of the oil, gas and mineral rights of the tribe and its unadjudicated and unliquidated claims against the government.

We find the plaintiffs' claim that we are bound by collateral estoppel and res judicata to be unpersuasive. Both doctrines require an identity of factual issues in the two cases. Katzburg v. Krebs, 545 f.2d 104, 106 (10th Cir.); In re Johnson, 518 F.2d 246, 252 (10th Cir). Here, the facts underlying the plaintiffs' claims are different. The range corporations' stock was not at issue in Affiliated Ute. The range corporations' functions were not the same as those of the distribution corporation in the prior case. The actions of the Bank complained of in Affiliated Ute are significantly different from those at issue here. Because there is not a sufficient identify of factual issues between the two cases, we decline to apply the doctrines of res judicata and collateral estoppel.

We look first to the plaintiffs' securities laws claims. The plaintiffs claim that the Bank violated the antifraud provisions of the Securities and Exchange Act of 1934 and the Act's disclosure provisions.

The Supreme Court has enunciated a test for determing whether an interest is a "security" under the Act. That test is "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others". Securities and Exchange Comm'n v. W. J. Howey Co., 328 U.S. 293, 301.

Here, shares in the range corporations allowed their holders to graze a certain number of cattle and sheep on the range proportionate to the amount of shares held. The articles of incorporation designated the range corporations' purposes to include the maintenance of a range for grazing and

"to construct, operate and maintain fences, corrals, sheds, barns and other fixtures and equipment necessary, convenient or incidental to the proper care of cattle "sheep".

The corporations were to be nonprofit and to have at least 85 percent of their income drived from assessments collected from the shareholders. The corporations were formed to convert the undivided interests of each mixed-blood into something which could be easily transferred and something which could be used as an indicia of ownership.

The range corporation stock does not meet two elements of the Howey test: an expectation of profits and that the profits arise "solely from the efforts of the promoter or a third party". 328 U.S. at 299. The plaintiffs argue that many of the shareholders who did not wish to graze

their own cattle anticipated profit by selling their shares to those actively engaged in grazing. These shareholders, they claim, relied on the efforts of the corporations to maintain and improve the range lands and consequently enhance the value of their shares.

With respect to those shareholders who wished to graze their cattle on the range lands, the stock was clearly not a security. If the primary benefit of stock ownership is the shareholders' use of the subject property, the necessary investment intent and expectation of profit is missing. United Housing Foundation, Inc. v. Forman, 421 U.S. 837 at 857.

For those shareholders not wishing to graze cattle on the range lands, the trial court found that any enhancement of the value of their shares by virtue of the corporations' improvement of the range

would have been merely incidental. The corporations were created to facilitate the use of range land by the shareholders, not as potential investments. Had the corporations been designed to profit the shareholders, either through the distribution of earned income or by the enhancement of stock value, they could not have been organized under the Utah Nonprofit Corporation and Cooperative Association Act, Utah Code Ann. § 16-6-21. 16 A.L.R.2d 1345, 1348. The plaintiffs could have had no reasonable expectation of profit from any corporate activity.

The plaintiffs' reliance in our holding in Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036 (10th Cir.), is misplaced. In Aldrich, the trial court dismissed the plaintiffs' securities laws claims, holding that the subdivision lots purchased by them were not securities under

15 U.S.C. § 78(a)(10). We reversed and remanded, holding that the trial court should have heard evidence regarding the promotional emphasis of the developer and the plaintiffs' investment intent. We noted that the lack of dividends or other realization of gain prior to the selling of the lots did not preclude investment intent. Profits, we realized, could arise from capital appreciation resulting from a corporation's development of its initial investment. In this case, after reviewing the record, we agree with the trial court's finding that there was no promotion of the range corporations as potentially profitable investments, or that corporate range management in fact increased the value of the shares or was really intended to so do.

We conclude that even though the plaintiffs' interests in the range corporations were referred to as "stock", the

plaintiffs would have had no reasonable expectation of profits to arise solely from the efforts of the promoter or a third party. Consequently, we must hold that the range corporation stock was not a "security" for the purposes of establishing a claim under federal securities law.

Plaintiffs who were not beneficiaries of the express trust assert that the Bank breached its common law and statutory fiduciary responsibilities as their trustee. These plaintiffs argue that the Bank functioned as a transfer agent for all mixed-bloods and created an atmosphere of trust in which the adult sellers came to rely on the Bank. These plaintiffs' claim relies on Affiliated Ute Citizens v. United States, 406 U.S. 128. In that case, two employees of the Bank were accused of breaching their fiduciary duty to the mixed-bloods in the sale of Ute

Distribution Corporation shares in violation of Rule 10b-5. The Court there determined that not only did the Bank function as transfer agent for the UDC shares, but the employees 'were active in encouraging a market for the UDC stock among non-Indians', 406 U.S. at 152, quoting Reyos v. United States, 431 F.2d 1337 at 1345 (10th Cir.), and the employees' scheme constituted a fraud on the Indian sellers. The facts in this case, as we have discussed, are significantly different. The Bank functioned as a transfer agent but the trial court found that it did not "undertake to advise the adults as to the sale of their shares or the price thereof in any meaningful way". 521 F. Supp. at 562. The Bank was simply not engaged in anything more than ministerial functions when dealing with the adult mixed-bloods. It was not creating a

market as in Affiliates Ute and did no more than negotiate a sale of the trust shares. Consequently, we hold that the Bank had no fiduciary duty to the mixed-blood adults.

The Bank's fiduciary duty to the named beneficiaries of the trust is unquestioned. Some plaintiffs also claim that the Bank breached the terms of the trust agreement and violated its common law and state statutory fiduciary responsibilities. Utah Code Ann. § 33-2-1 is a codification of the common law standards. The Bank trustee was under a duty to the beneficiaries to exercise the care and skill in dealing with the trust property required by the trust instrument and Utah law. Restatement (Second) of Trusts § 174 (1959). The plaintiffs vigorously dispute the trial court's conclusion that the Bank's sale of the stock was within this standard. The plaintiffs claim that the Bank did not

prudently determine the value of the stock before selling it, that the Bank failed to properly communicate with the beneficiaries, and that the Bank was improperly dealing for its own benefit or for the benefit of the full-bloods.

The trial court found that the Bank set the $1,100 unit price at which the stock was sold pursuant to an appraisal by Charles Moore who after an extensive survey had valued the range land at approximately $1,000 per unit. Expert testimony established that similar range land in Utah appreciated ten percent between the time the Moore appraisal was made and the time in issue. The Bank contends that its $1,100 sales price was thus reasonable and prudent. The plaintiffs contend that the Bank should have procured a more recent appraisal of the land value and should have

tested the market prior to establishing an offer price.

The plaintiffs raise some evidentiary questions regarding the admission and relevance of the Moore report. The trial court's conduct of the trial proceedings will not be disturbed on appeal unless it affirmatively appears from the record that the trial court abused its discretion. Rasmussen Drilling v. Kerr-McGee Nuclear Corp., 571 F.2d 1144 (10th Cir). The plaintiffs did not make a showing that the trial court abused its discretion in this regard.

The trial court found that the Bank did not act imprudently in utilizing the Moore appraisal. The Bank's interpolation of the range land value from nearby property values and the expert testimony was reasonable under the circumstances.

The plaintiffs contend that the Bank did not consider the value of water, timber, hunting and fishing rights in its valuation of the land. The corporate purposes related only to grazing and the shares only gave the owner thereof the right to graze a stated number of cattle or sheep during a certain time of year. What other rights may have been was not demonstrated. In any event, the plaintiffs did not initially claim that the Bank breached its fiduciary duties by not considering the separate elements, and we decline to consider such a contention on appeal. Gulf Coast Western Oil Co. v. Trapp, 165 F.2d 343 (10th Cir.). The trial court properly disposed of the issue of value and the method of valuation.

The plaintiffs further claim that the Bank failed to maximize the sales price of the land by neglecting to test the market.

This is an argument based on the offer made by Mrs. Sprouse. However, we can see no useful purpose in considering such an offer as having anything to do with a "market" in view of the rejection of her bid and the reason for its rejection.

The plaintiffs also argue that the Bank failed to properly communicate with the trust beneficiaries. Their claim is based on the Restatement (Second) of Trusts § 170(2) (1959), which provides that a trustee, in dealing with the beneficiary on the trustee's own account, must communicate to the beneficiary all material facts in connection with the transaction. Here, there is no evidence whatever that the Bank was dealing on its own account. The plaintiffs have made no allegation that the Bank failed to furnish them information that they had requested pursuant to § 173 of the Restatement. The plaintiffs'

contention that the Bank was dealing on its own account or for the benefit of the full-bloods was so rejected by the trial court. The issue is one of fact and is clearly supported by the record.

We find the other issues raised by the plaintiffs to be without merit.

AFFIRMED.

APPENDIX B

MARCH TERM - March 21, 1983

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable, James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Luther L. Bohanon, District Judge*.

RANDOLPH C. HACKFORD, LAWANNA KAY REED THOMPSON, ALLEN D. REYOS and ORANNA BUMGARNER MOOSMAN, for themselves and for and on behalf of all other persons similarly situated,	)	
Plaintiffs-Appellants,	)	No. 81-1863
vs,	)	
FIRST SECURITY BANK OF UTAH, N.A.,	)	
Defendant-Appellee.	)	

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/S/
HOWARD K. PHILLIPS, Clerk

* Of the United States District Court for the Western District of Oklahoma, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

RANDOLPH C. C. HACKFORD LAWANNA KAY REED THOMPSON, ALLEN D. REYOS and ORANNA BUMGARNER MOOSMAN, for themselves and on behalf of all other persons similarly situated, Plaintiffs, vs. FIRST SECURITY BANK OF UTAH, N.A., Defendant.	)	Civil No. C-75-278 MEMORANDUM OPINION

This action was filed July 17, 1975. An order was entered March 24, 1977 for the maintenance of the action as a class action.

The matter was tried to the Court with trial ending December 4, 1979. Appearances were as follows:

Parker M. Neilson, Esq. and Paul T. Moxley, Esq. appearing for Plaintiffs .

Thomas A. Quinn, Esq. and James S. Jardine, Esq. appearing for Defendant.

Oral argument was heard January 3, 1980. Briefs and supplemental briefs and communications were filed with the Court, the last of such being filed December 9, 1980.

The matter is now ripe for decision.

FACTS

Plaintiffs claim that the defendant, First Security Bank of Utah (Bank) violated provisions of the Securities and Exchange Act of 1934,[1/] and breached its state statutory and common law fiduciary duties when in 1960-61 it sold certain shares of stock held by it as trustee and facilitated the sale of similar shares held by others to the Ute Indian Tribe. The case was tried to the court, the undersigned, the third judge to consider the matter. The relevant facts are as follows:

In 1954 Congress passed the Ute Indian Supervision Termination Act.[2/] That Act classified as "mixed-bloods" all members of the Ute Indian Tribe of the Uintah and Ouray Reservation who did not possess at least one-half Ute Indian

ancestry and in excess of one-half Indian ancestry.[3/] There were then 490 "mixed-bloods". The remaining members of the tribe were deemed "full-bloods". The purpose of the Act was stated as follows:

> § 677. Purpose
>
> The purpose of section 677-677aa of this title is to provide for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property. Aug. 27, 1954, c. 1009, § 1, 68 Stat. 868.

To that end, the Act required that representatives of the two groups, the "mixed-bloods" and the "full-bloods", divide the tribal assets between them.

The representative of the mixed-blood group was the Affiliated Ute Citizens of the State of Utah (AUC) an association made up of the individual mixed-bloods. The representative of the full-bloods was the Tribal Business Committee.

After the division of the tribal assets, the group of mixed-bloods was required to devise a plan for the distribution of its share of the tribal assets to the individual members of the mixed-blood group and to carry out the plan. For the ten year period following the Congressional enactment, no mixed-blood could dispose of his interest in any real property obtained by him in the distribution of mixed-blood assets without first offering it to the other members of the tribe, i.e. mixed-bloods and full-bloods, in a form approved by the Secretary of

Interior. The Secretary was directed by the Act to protect the interests of those mixed-bloods who were minors, non compos mentis, or in his opinion, otherwise in need of assistance. Federal supervision of the mixed-bloods was terminated on August 27, 1961. The restrictions on the disposition of real property by mixed-bloods continued until August 27, 1964. When the tribal assets were divided,[4/] among other things, the members of the mixed-blood group received 172,000 acres of range land. In 1958, as part of the plan for distributing the mixed-blood group's share of the assets to its individual members, the mixed-blood group formed two non-profit grazing corporations under the laws of Utah: The Rock Creek Cattle Corporation (Cattle Company) and the Antelope Sheep Range Corporation

(Sheep Company). Of the 172,000 acres of range lands, 44,000 acres were allotted to the Cattle Company and 128,000 to the Sheep Company. Each mixed-blood then surrendered his undivided interest in the range land allotted to the Cattle Company and in return received the right to one share of Cattle Company stock. The same procedure was followed for the Sheep Company. Thereafter the United States issued patents conveying the respective portions of the range land directly to the corporations, and Range Company shares were then issued to the individual mixed-bloods or to the defendent trustee Bank. The two shares, a share in each of the range corporations, were commonly referred to as a unit.

A share in the Sheep Company entitled its holder to graze five sheep upon the

summer range for six months during grazing season, and five sheep upon the winter range for six months during the winter grazing season. Holders of Cattle Company stock were entitled to graze five head of cattle for six months during a normal year for each two shares of stock held. The Articles of Incorporation of each of the range corporations declared the corporate purpose to be the maintenance of a range for grazing, and incidentally thereto, to "construct, operate and maintain fences, corrals, sheds, barns and other fixtures .." In addition, each of the articles states that the corporation is to be non-profit and that at least 85% of its income is to be "derived from assessments collected from the stockholders and shall be used for the sole purpose of meeting such expenses or losses that may be

incurred by the corporation." The articles of incorporation of each range company designated the Bank as transfer agent of the shares.

The Secretary of Interior, pursuant to his duty under the Termination Act to protect the interests of minors and non compos mentis, appointed the Bank as trustee of the assets of 174 mixed-bloods identified by the Superintendent of the Uintah and Ouray Agency of the Bureau of Indian Affairs. Of these 174, 162 were minors. The trust agreement, executed in July of 1960, gave the Bank sole discretion to manage the assets of the trust estate in the best interests of the beneficiaries. By virtue of such agreement, the Bank held the range corporation shares of each of the 174 beneficiaries in

trust for the use and benefit of each such persons.

Although it was not until October of 1960 that the stock certificates in the range corporation were physically issued, many of the adult mixed-bloods traded in the shares representing grazing rights soon after the range companies were formed in 1958. These so-called "private treaties" or contracts of purchase and sale resulted, in part, from the B.I.A. and John Boyden emphasizing to the mixed-bloods that those mixedbloods who wished to engage in the livestock business in any meaningful way should acquire additional grazing rights shares from those mixed-bloods who desired to sell their shares. Many mixed-bloods traded in their anticipated shares, 5/ even though the Termination Act and the articles of the range

corporations initially limited the market by requiring sale to be made to mixed-bloods or to full-blood members of the tribe [6/] in a manner approved by the Secretary of Interior. The "private treaties" occurred prior to the Secretary of Interior's promulgation of regulations regarding sale of the range company shares, and were ineffective absent the prescribed offer to qualified [7/] purchasers.

In the spring of 1960, the full-bloods became interested in acquiring stock in the range corporations. In a letter dated March 31, 1961, the Chairman of the Tribal Business Committee informed the Commissioner of Indian Affairs that the A.U.C. and the Committee had met and discussed the possibility of purchasing shares of the range corporations for their

appraised value. The Commissioner responded in a letter dated June 16, 1960 that his office would approve the expenditure of tribal funds for such purchase only if the full-bloods could acquire a controlling interest.

On August 5, 1960, the Secretary promulgated regulations, providing policies and procedures governing the disposition of certain assets by mixed-blood.[8/] The regulations became effective September 11, 1960, and required stockholders in the range corporations who wished to dispose of their stock to offer the stock first to the remaining mixed-bloods and the full-bloods in a prescribed manner.[9/] There was no provision for the type of "private treaties" that had emerged during the time prior to the issuance of the regulations.[10/]

On August 12, 1960, Area Director F. M. Haverland, wrote to the Commissioner of the B.I.A. concerning the requirement that the full-bloods purchase a majority of the stock if tribal funds were to be used. He notes that the regulations issued by the Secretary required the range company stock, if offered, to be offered to the "members of the tribe" and that a "member of the tribe" was defined in the regulations to include "all mixed-blood and full-blood members". He further noted that the regulations defined "tribe" as the Ute Indian Tribe. It was his interpretation of these definitions that the "tribe" was the full-bloods represented by the Tribal Business Committee.[11/] The tribe was not a "member of the tribe" and thus could not initially purchase range company shares but could purchase only

after an offer had been made to individual mixed-bloods and individual full-bloods. Thus, the letter expressed his concern that the tribe of full-bloods would be unable to obtain a majority of the shares of stock. It was his further concern that if the "tribe" fell within the definition of "member of the tribe" by regulation such was in his opinion not authorized by the Termination Act.

On August 16, 1960, John Boyden, having received word of Area Director Haverland's August 12 letter, wrote to the Commissioner alerting him to the existence of schemes by non-Indians to acquire the range land and urging him to either amend or interpret the regulations so as to permit the tribe to accept offers of sale of range company shares or the land [12/] held by the range companies. On August

17, Area Director Haverland again wrote to the Commissioner and informed him of the existence of the private treaties and the ongoing concern of those mixedbloods who had purchased grazing company shares by "private treaty" when they learned that the Ute Tribe (full-bloods) was interested in purchasing shares in the range corporations.[13/] Many of these private treaty purchasers had retained counsel to assist them in protecting their interests in the shares which they had purchased. In view of this potential problem, the Area Director proposed that the Commissioner void all private treaty transactions in the range company shares which took place prior to the issuance of the regulations and which had not conformed to the procedure provided in the regulations.

On August 24, 1960, the Department of Interior sent a telegram to Area Director Haverland informing him (1) that the Ute Indian Tribe was a "member of the tribe" for purposes of the offer requirements,[14/] and (2) that the private treaties entered into prior to the issuance of the regulations and which did not conform to the required procedures were invalid. The telegram also informed the Area Director that concerning his August 12 letter to the Commissioner "We (B.I.A.) do not share your apparent concern regarding reported purchases for outcome of any possible suit."

The Area Director again wrote the Commissioner on September 2, 1960 and recommended that the B.I.A. relax the requirement that the tribe, if it purchased stock, purchase a majority. The

Area Director foresaw no possible way for the tribe to assure itself of a majority of shares under the regulations. The next best thing, in his view, was to allow the tribe to purchase the block of stock held in trust by the Bank, which would give it 170 of the 246 shares needed to obtain a majority.[15/] The Commissioner adopted the recommendation of the Area Director, and in a letter dated September 27, 1960, informed the Tribal Business Committee that it could bid on the stock held by the Bank.

On September 12, 1960, the full-bloods, represented by the Tribal Business Committee authorized John Boyden; its attorney and Rex Curry, its Executive Secretary, to offer the Bank $1,100 a unit, i.e. for 1 share in each of the two range corporations. A meeting of the

Bank's Trust Committee was convened the next day, September 13, 1960, and Messrs. Boyden and Curry submitted the proposal. They informed the Trust Committee that the full-bloods were interested in obtaining a majority of the shares in each of the range corporations. The $1,100 figure submitted was clearly based upon the so-called "Moore appraisal".

The "Moore appraisal" was conducted in 1958 by Frank Moore, an appraiser selected by the Bureau of Indian Affairs and employed by the AUC to perform an appraisal on certain tribal range land, including the land which eventually went into the range corporations. In 1958, the Moore appraisal valued the land which went into the range corporations at $492,000. Thus, the book value of each share of

range company stock amounted to about $500 or $1,000 a unit.

After the Trust Committee meeting at which the representatives of the full-bloods appeared, unrebutted evidence at trial reveals that the Bank circulated questionnaires to 116 of the trust beneficiaries or their parents asking them if they desired to sell their stock to the full-bloods for $1,100 a unit. Of those contacted, 84 indicated a desire that the stock be sold, 25 indicated a desire that it not be sold. On September 23, 1960, ten days after receiving the full-bloods' proposal, the Bank, as Trustee, offered to sell 147 units of the stock it held to the Ute Indian Tribe (full-bloods) at not less than $1,100 per unit. The units offered were those where the beneficial owner or parent had not expressly asked that the

shares be retained. The offer was made by trustee Bank subject to (1) a right to repurchase a maximum of 15 units at $1,100 a unit within five years from the sale, (2) a continuing offer of the purchaser to purchase additional units, not to exceed 23, at $1,100 per unit for a period of five years, and (3) in the event that the tribe purchased the shares, a right in the beneficial owner of the shares sold, to purchase a lifetime hunting and fishing permits on the entire Ute Indian Reservation for the sum of $60 upon the same terms and conditions as such permits were sold to the public. Under the regulations, the offer was made to the individual mixed-bloods and full-bloods, as well as to the tribe. The offer was accepted by the tribe on October 14, 1960, and by

one Margaret Sprouse, a mixed-blood, on October 17, 1960, the last day that acceptances could be made.

On October 18, 1960, the tribe (full-bloods) sent a letter to the Superintendent protesting the acceptance by Margaret Sprouse, claiming that she represented non-Indian interests. John Boyden discussed the matter with the Area Director and urged an investigation by him or permission to furnish information to him which would demonstrate that Mrs. Sprouse was acting on behalf of non-Indian and thus non-qualified purchasers. On October 25, 1960, the Area Director wrote to the Commissioner recommending that the Department of Interior institute an investigation to determine whether Mrs. Sprouse's acceptance conformed to regulations. By copy of this letter, the Area

Director instructed the Superintendent to notify the tribe and Mrs. Sprouse that the opening of the sealed bids scheduled for November 3, was to be postponed until November 17. The Area Director complied on October 28. On October 29, 1960, Mrs. Sprouse brought suit in the United States District Court for the District of Utah seeking an order temporarily restraining the Superintendent from permitting the tribe or any individual full-blood to accept any offer made to sell shares in the range corporations, and seeking an adjudication that the Termination Act did not authorize the sale of the range company shares to the full-bloods individually, or collectively as the tribe. The court that day restrained all sales activity in the shares. The Federal Bureau of Investigation investigated the

circumstances surrounding Mrs. Sprouse's offer. Based upon that investigation, and upon testimony given at a hearing held before the district court in the Sprouse action, the Department of Interior concluded that Mrs. Sprouse was not acting in her own behalf in seeking to purchase shares in the range corporations. By letter dated January 19, 1961, the Department notified the Area Director of its conclusion, and instructed him to proceed with purchase by the tribe. On March 6, 1961, the district court held that the full-bloods individually, and the tribe could accept offers to sell the shares and lifted the restraining order. On March 9, 1961, the Superintendent mailed a check to the Bank representing full payment by the tribe, the only remaining acceptor of the

Bank's offer, for the 147 units held by the trustee Bank.

During this time, the adult mixed-bloods had been offering their individual shares for sale at book value and above. Only Mrs. Sprouse and the tribe accepted any of these individual offers. After the Department of Interior invalidated the acceptances of Mrs. Sprouse, she apparently accepted no more offers. Thereafter, only the tribe purchased shares in the range corporations. The price remained at $1,100 per unit. By May 3, 1963, the tribe had purchased all but 48 range corporations units of which 19 units were still held by the Bank in trust. John Boyden thereafter informed the trustee Bank of the tribe's plan to dissolve the range corporations. The corporations were eventually dissolved

and the 39 [16/] mixed-bloods whose shares had not been sold to the tribe received individual interests in grazing land.[17/]

It is the contention of the plaintiffs that the trustee Bank's sale of the stock to the tribe, and its facilitation of sales by others to the tribe contravened the interests of the mixed-bloods and were unlawful. The plaintiffs, in representing a class of mixed bloods comprising all trust beneficiaries whose stock was sold to the Ute Tribe, allege that the Bank violated Section 10(b) of the Securities and Exchange Act of 1934, [18/] Rule 10b-5 [19/] promulgated thereunder, and its state statutory [20/] and common law fiduciary duty to the beneficiaries. [21/] The plaintiffs also purport to represent a class comprising all mixed-bloods who sold their stock to the tribe, and allege

that the Bank had and breached a fiduciary duty to them and aided, abetted, and conspired with others to defraud them in violation of Rule 10b-5.

II. CLAIMS OF THE TRUST BENEFICIARIES

A. Federal Securities Law Claims

The Bank contends that the plaintiff trust beneficiaries lack standing to bring this action under Rule 10b-5. The trustee Bank, not the beneficiaries, sold the stock to the Ute Tribe. Therefore, the Bank argues, the beneficiaries were neither the "purchasers" nor the "sellers" to which Rule 10b-5 standing was limited by the United States Supreme Court in Blue Chip Stamps v. Manor Drug Stores, Inc., 421 U.S. 723 (1975). It is not correct that to find that the trust beneficiaries have standing to sue under the Rule would run contrary to the policy underpinnings of Blue Chip's "purchaser or seller" requirement, or would realize the fears

which prompted the court to adopt it. Briefly stated, the concern of the Blue Chip Court was, that in the absence of the limitation, bystanders to the securities markets would be availed of an opportunity, without risk and with the benefit of hindsight to initiate "strike" or nuisance litigation when predictions and performance failed to coincide. And, since the outcome of such suits would normally turn on the speculative finding of whether the plaintiff "would have purchased", or "would have sold" but for the alleged misrepresentation or failure to disclose, summary disposition of these suits would be rare and settlement in terrorem, frequent. Those concerns do not come to the fore in this instance. While the trust beneficiaries did not perform the mechanics of the sale of their stock,

they were not the bystanders contemplated by Blue Chip. They are separate from the public at-large. It was stock in which they had a beneficial interest which was sold. If any fraud occurred as to them, it was they who would feel the impact, not the trustee "seller". While the court is aware of some case authority to the contrary, see e.g. Schoenbaum v. Firstbrook, 405 F.2d 200, 213, rev'd. en banc, 405 F.2d 215 (2nd Cir. 1968) cert denied, 395 U.S. 906 (1969), Lincoln National Bank v. Lampe, 414 F.Supp. 1270 (N.D. Ill. 1976), Rippey v. Denver United States National Bank, 273 F.Supp. 718 (D. Colo. 1967), it is unwilling to extend, or apply, as the case may be, the holding of Blue Chip to deny plaintiffs standing in this case. See Kirshner v. United States, 603 F.2d 234 (2nd Cir. 1978); Klamberg v.

Roth, 425 F. Supp. 440 (S.D. N.Y. 1976); Heyman v. Heyman, 356 F.Supp. 958 (S.D. N.Y. 1973).

To say the trust beneficiaries have standing is not to say they have stated a cause of action under Rule 10b-5. It is undisputed that under the terms of the trust agreement, the Bank, as trustee, was under no obligation to inform, or seek the advice of or concurrence of the trust beneficiaries prior to a sale of the trust assets. Further, the agreement contemplates that it could be "amended, modified or supplemented" and I assume terminated, only "by the District Court [of the State of Utah, Duchesne County] upon application by the trustee, a beneficiary or on the court's own motion with due notice by publication to beneficiaries

. . ." Consequently, any misrepresentation or omission on the part of the Bank would have, in the first instance, been material only to the decision of a beneficiary to apply to the State District Court for relief. Stated another way, the necessary, although unarticulated claim of the trust beneficiaries, is that but for the alleged misrepresentations and omissions of the Bank, they would have successfully petitioned the District Court to terminate the trust and thereafter refused the offer of the Ute Tribe and retained the range company stock.

In Santa Fe Industries v. Green, 430 U.S. 462 (1977), the Supreme Court held that a breach of fiduciary duty by majority stockholders, alone, without deception, did not violate Rule 10b-5.

The action in Santa Fe involved a corporation's minority stockholders who had been forced by a 95 per cent stockholder to sell their shares back to the corporation at a price set by the board of directors. A Delaware short-form merger statute permitted the squeeze subject only to the minority shareholder's right to challenge the price in court. It was undisputed that the majority shareholder had in all respects, complied with the statute. Notification of the merger, received the day after it became effective, was accompanied by the independent appraisals of the company's assets and its stock upon which the price offered was based. The minority did not avail themselves of this statutory right of appraisal, but instituted an action in federal court alleging that the price paid

was unfair and in violation of Rule 10b-5. They also alleged that the majority shareholder's failure to notify them in advance of the merger, although not required by Delaware law, was a material non-disclosure and also violative of the Rule. The Supreme Court, based upon the district court's finding that the documents supplied the minority shareholders contained no material misrepresentation or omission, but provided all the information relevant to their decision whether or not to seek review, held that even if the price set was unfair and reflected a breach of fiduciary duty, such was not actionable under Rule 10b-5. Specifically, the court concluded that "deception" or "manipulation" are essential elements of an action under the Rule, and refused to

imply a cause of action based upon unfairness alone -- conduct not violative of the "fundamental purpose" of the Act and which is "traditionally left to state regulation". Id. at 478. In short, the federal interest is in disclosure. As to plaintiffs' claim that the majority shareholder's failure to provide them with advance notice constituted a material non-disclosure violative of the Rule, the Court held in a footnote 1/ that since the plaintiffs could have done nothing to impede the transaction, the failure to provide early disclosure was not material.

Santa Fe has application here. Santa Fe teaches that this court under and limited to 10b-5 need not examine the fairness of the sale of the range corporation stock, i.e. whether it was in the best interests of the beneficiary.

Rather, the appropriate question is whether there was some material deception, in this case non-disclosure. If it is assumed that the trustee Bank failed to disclose to the beneficiaries facts which would have prompted them to terminate the trust and recover the stock, it is arguable that such a non-disclosure would have been material. The holding in footnote 14 of the Santa Fe opinion makes it reasonably clear that a non-disclosure may be actionable under the Rule even if not immediately material to the investment decision.

In situations of corporate self-dealing in securities involving breach of majority shareholders of the fiduciary duty owed the corporation, the situation alleged in Santa Fe, minority shareholders, if aware that such a breach is

imminent, normally have no power to prevent it and thus no investment decision save the decision to bring a derivative action. Nonetheless, the Santa Fe court recognized that an omission may be material in such a setting if the information concealed would have been significant to a minority shareholder's decision to seek state court relief from an impending securities transaction, even though their approval of the transaction was not required. 2/ In this sense, an omission may be material only if a state-law remedy is available. Unlike the minority shareholders in Santa Fe, plaintiffs had such a remedy available to them, at least under the terms of the trust agreement. However, implicit in the Santa Fe Court's recognition of this material information once-removed is that Rule 10b-5 imposes

upon majority shareholders the duty to disclose it to the minority [3/]. In my view, the Rule imposes no analogous duty upon the Bank, as trustee, here. The import of Santa Fe is not that a duty to disclose arises from the existence of a state-law remedy. Rather, the Rule imposes it in situations where the failure to disclose would result in deception. The duty to disclose apparently recognized in Santa Fe has its doctrinal underpinning, [4/] but those aside, minority shareholders are different from the minor trust beneficiaries here. Those in control of a corporation are rarely there by virtue of a trust placed in them by minority shareholders incapable of perceiving the corporation's interest, but because of the magnitude of their investment. The trustee here was

intentionally given control, indeed the sole discretion to act, because of the perceived, and probably real, inability of the minors to act in their own interest. Even the law imparts a disability to minors and limits their ability to bring actions in their own behalf. 5/ It makes little sense to impose upon the trustee, here, a duty to disclose the nature of its actions to minors from whom the decision-making ability has been intentionally removed. Moreover, under the terms of the trust agreement, the beneficiaries, unlike minority shareholders, had no expectation that the Bank would inform them in advance of its actions. Consequently, it is difficult to conceive that a failure to disclose would have deceived them. In short, if Santa Fe imposed a duty upon majority shareholders

to disclose to minority shareholders information material to the latter to litigate, I refuse to extend it to the trustee Bank here. See O'Brien v. Continental Illinois National Bank and Trust, 593 F.2d 54 (7th Cir. 1979).

Nonetheless, even if the Bank had a duty to disclose its intentions in advance in order to avail the beneficiaries of a decision to pursue their state court remedy, there is no evidence that such a duty was breached. Prior to the Bank's sale of the stock, 116 of the trust beneficiaries or their parents were contacted, either by or through the Bank, as to their wishes relative to the sale of their stock to the Ute Tribe. Most, if not all, of these contacts took the form of a questionnaire which disclosed that the Ute Tribe would be the purchaser and

was willing to pay $1,100 for each "unit" consisting of one share of stock in each of the range corporations. Of these 116, approximately 80 beneficiaries or their parents indicated their desire that the stock be sold to the Ute Tribe. Approximately 25 indicated the contrary, and the Bank did not sell the stock of those beneficiaries. Apparently the Bank sold as well all of the stock held for those beneficiaries not contacted. The major contentions of the plaintiffs are that the Bank acted in the interest of the Ute Tribe and sold the stock for too low a price.[6/] As to those beneficiaries contacted, the Bank's disclosure of the price and the purchaser provided them sufficient information upon which to base their decision to sell. If they thought the price was too low,[7/] or were fearful

of the prospect of the Ute Tribe gaining control of the range corporations, [8] their choice was clear. As to them, there was no deception and consequently no Rule 10b-5 cause of action under the holding of Santa Fe. Plaintiffs have not attempted to identify them and have not alleged that they or any of them were unaware of the Bank's intentions. The court cannot assume that they were unaware when the Board of Director's of the Affiliated Ute Citizens [9] and 116 of the 174 trust beneficiaries knew that the Bank was considering the sale. As the prospective sale pended, they could have notified the Bank of their desire not to have the stock sold, or to seek legal redress. Although the Bank offered to sell the 147 shares in September of 1960, it was not until March of 1961 that the sale was completed. In

the interim, the Bank forwarded a copy of the offer to Martin Zollar, Superintendent of the Uintah and Ouray Reservations. Martin Zollar notified both range corporations, the Ute Distribution Corporation and the Bureau of Indian Affairs of the offer; the offer was posted, [10/] Margaret Sprouse, an adult mixed-blood, accepted the offer as did the Ute Tribe. Mrs. Sprouse brought an action in federal court seeking to enjoin the Ute Tribe from accepting the Bank's offer; and the court held a hearing and dismissed the action. In view of the above, and the fact that the Bank honored the requests of those beneficiaries contacted who did not wish their stock sold, it is difficult to infer from the Bank's failure to contact some of the beneficiaries an attempt to conceal relevant information from them.

That information was certainly available, if not directly communicated by the Bank in all instances. In the absence of evidence that specific beneficiaries not contacted did not know that their stock was about to be sold, I cannot conclude that they were deceived as they must be in order to state a claim under Rule 10b-5.

In addition to plaintiffs failure to demonstrate either a duty or a failure to disclose, their 10b-5 claim is further deficient for the reason that the range company stock was not a security within the meaning of the Securities and Exchange Act of 1934. [11/] This conclusion is based upon the characteristics of the stock, the Act's definition of a security, and the construction of that definition by the United States Supreme Court. A share in

the Sheep Company entitled its holder to graze five sheep upon the summer range for six months during grazing season, and five sheep upon the winter range for six months during the winter grazing season. Holders of Cattle Company stock were entitled to graze five head of cattle for six months during a normal year for each two shares of stock held. As previously noted, the Articles of Incorporation of each of the range corporations declared that the corporate purpose was to be the maintenance of a range for grazing, and incidentally thereto, to "construct, operate and maintain fences, corrals, sheds, barns and other fixtures. ..." In addition, each states that the corporation is to be non-profit and that at least 85% of its income is to be "derived from assessments collected from the stockhold-

ers and shall be used for the sole purpose of meeting such expenses or losses that may be incurred by the corporation".

Section 3(a)(10) of the Securities Act of 1934, [12/] defines a "security" as "any note, stock, treasury stock, bond, debenture, certificate of interest, or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to

subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited." Plaintiff contends that this broad definition embraces the range company stock in at least two of its categories; in plaintiffs view the stock is both an investment control and an instrument commonly known as a "security". The court recognizes that instruments may be included within the definition of a "security", "if on their face they answer to the name or description." S.F.C. v. Joiner Corp., 320 U.S. 344, 351 (1943). Finally, plaintiff argues that the United States Supreme

Court, in Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) collaterally stopped the defendant from denying that the range company stock is a "security" when it held that Bank employees violated Rule 10b-5 when they made a market in the stock of the Ute Distribution Corporation.

Section 3(a)(10) lists several terms in its attempt to embrace the full range of commercial forms which are, in concept, securities. See H.R. Rep. No. 85, 73rd Cong., 1st Sess., 11 (1933). Some are specific and addressed to instruments generally recognized and of common usage. Others are more general and designed to include more novel types. None of these terms is itself defined, so that on its face, the definition does not contour the "concept of a security." The United

States Supreme Court has provided illumination. In Securities and Exchange Commission v. W. J. Howey Co., 328 U.S. 293 (1946), the court considered a plan whereby investors were offered the opportunity to purchase plots of land in the seller's citrus groves. For a cost-plus fee, the seller would cultivate, harvest and market the crop grown on the buyer's plot. The profits were then pooled and distributed to the investors in proportion to the size of the holdings of each. The court characterized the issue before it as that of determining whether "the land sales contract, the warranty deed and the service contract together [13/] constitute[d] an "investment contract" within the meaning of § 2(1) and thus requiring registration under the 1933 Act." Id. at 297. The court held that the transaction

was in fact an investment contract under the following test:

> " ... ... an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party ... ." 328 U.S. at 298-299.

Later, in United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975), the court declined to draw a distinction between an "investment contract" and "an instrument commonly known as a security" and suggested that the Howey test is essential to any inquiry into the existence of a security, irrespective of the form of the transaction at issue. Id. at 852. See also International Board of Teamsters v. Daniel, 439 U.S. 551, 558 n. 11 (1979).

This is a sensible approach to the application of § 3(a)(10) and is adopted here. If, as the Supreme Court has reiterated, "that in searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality", Tcherepnin v. Knight, 389 U.S. 332 (1967), it should generally be of no moment which of the forms listed in § 3 (a)(10) a transaction most closely resembles. The Howey test capably exposes the economic reality necessary to determine whether any form of transaction falls within the Act's definition of "security".

Applying Howey to the range company shares, it would seem that the first requirement is met. It can be said that each mixed-blood "invested" in the range companies by foregoing his or her right to

an undivided interest in the range land in return for shares. However, the only enterprise which could produce a profit was that carried on by those individual mixed-bloods who utilized the land for grazing their livestock or who leased their shares to other mixed-bloods. The range companies' sole charge to maintain and improve the range lands resulted in no profit to the corporations, but merely facilitated the shareholders use of the land. Under their articles, the corporations were to be non-profit. Shareholders could expect no distributions from them; only assessments. Plaintiffs observe that many of the shareholders did not wish to graze livestock and anticipated converting their shares to cash in the market existing among those shareholders actively engaged in grazing. Thus, in plaintiffs

view, those shareholders relied upon the efforts of the range companies to efficiently maintain the land and to thereby enhance the value of their shares in that market. While it is true that many of the mixed-bloods desired to cash out of the corporations, any enhancement of the value of their shares by virtue of the corporation's maintenance of the range would have merely been incidental to the purpose of maintaining the range. Nor would such "profit" have borne any relation to a "common enterprise", since the corporation received no revenue from managing the land. Moreover, there is no evidence that it was ever represented to shareholders that they could expect profit from the sale of their shares because of range management, see Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036 (10th Cir.

1980), or that such management in fact increased the value of the shares.

Plaintiffs also argue that the California Supreme Court case of Silver Hills Country Club v. Sobieski, 361 P.2d 906 (Cal. 1961) held that shares in non-profit corporations are "securities". The so-called "risks capital" approach applied in that case, which construed California securities law, has not been adopted by either the Supreme Court [14/] or the Tenth Circuit. Nonetheless, it articulated no per se rule as to non-profit [15/] corporations and has no application here. The plaintiffs here did not invest "risk capital". The range companies were not risk ventures, there was no deal to go "sour". Rather, the shareholders merely exchanged their land for the right to use it in a particular

way. They could either exercise that right or sell it. In short, the range company shares were not "securities" within the meaning of Howey. Moreover, the mixed-bloods' exchange of their land for stock in the range corporations was not the typical securities transaction to which the federal securities laws are directed. Individual mixed-bloods had no investment decision relative to the exchange of their land once the Plan for Distribution had been adopted by them collectively and approved by the Commissioner of the Bureau of Indian Affairs. Indeed, the United States issued the patents directly to the range corporations. Thus, the uncertainty attended to normal securities transactions, and which the securities laws are designed to ameliorate, was not present. Nor was it

present when the shareholders were confronted with decisions relative to the buying and selling of their shares after their initial "investment". Those decisions were not based on predictions of the success of the corporate venture; there was no relevant corporate venture. Rather, it was based only on what the right to graze a limited number of livestock was worth to them. The range corporations really represented nothing more than an effort to hold and define the individual use of range lands collectively owned by the mixed-bloods.

Finally, as to plaintiffs' claim of collateral estoppel, it is clear that the decision in Affiliated Ute, supra, does not stop the Bank from denying that the range company stock is a security within the meaning of § 3(a)(10). Whether or not

the decision in Affiliated Ute could have collateral estoppel effect, the Court in that case adjudicated nothing relative to the range company shares. And, aside from the lack of identity of issues, that decision provides no support for any conclusion as to the nature of the shares at issue here. In Affiliated Ute, the court held that employees of the First Security Bank, which was a transfer agent for stock in the Ute Distribution Corporation, violated Rule 10b-5 when they encouraged a market in that stock among non-Indians and failed to disclose material information to mixed-blood sellers. The court was not presented in that case with the issue of whether or not the stock at issue here was a security.

The Ute Distribution Corporation, like the range corporations, was formed in

order to effect a distribution of assets to individual mixed-bloods. Its stated purpose was "to manage jointly with the Tribal Business Committee of the full-blood members of the Ute Indian Tribe ... all unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution to which the mixed-blood members of the said tribe ... are now, or may hereafter become entitled ... and to receive the proceeds there-from and to distribute the same to the stock-holders of this corporation ..."

Unlike the shareholders in the range corporations, the shareholders of the Ute Distribution Corporation looked to the managerial efforts of others to accumulate profits and distribute them. The decision

in Affiliated Ute is irrelevant to the issue of the existence of a security here.

B. Breach of Fiduciary Duty

As to the plaintiffs' claim that the Bank's sale of the stock constituted a breach of trust, the only issue really in need of resolution is the adequacy of the price offered. Plaintiffs claim that the sale to the tribe was, in and of itself, a breach of trust. The evidence does not support that conclusion. Although plaintiffs characterize the efforts of the tribe to re-acquire the range lands in terms of what the Bank "must have known", or "should have known", it is fairly certain that the Bank knew that the tribe wanted control, had the authorization of the United States to acquire control, and that Interior and B.I.A. interpretations

of the Termination Act and the regulations promulgated thereunder cleared the way for the acquisition of control. While it is not clear that the Termination Act contemplated that the tribe could act collectively to acquire real property distributed to the mixed-bloods, it clearly contemplated that range shares could fall into the hands of individual full-bloods, or members of the public if such were willing to pay in excess of what members of tribe would pay. Moreover, the shares were a non-liquid asset, actually income-depleting in view of the fact that they were subject to periodic assessment. The evidence shows that the trust beneficiaries, and the mixed-bloods in general, were in need of cash. In retrospect, the sale itself was not an imprudent one.

The claims of the plaintiffs regarding the inadequate price are really two in number, they claim that reliance by the Bank on the Moore appraisal was misplaced, and that the Bank should have tested the market in order to get the best price obtainable for the shares.

A. The Moore Appraisal

The "Moore appraisal", undertaken in 1958 by Frank Moore, a B.I.A. appraiser, commissioned by the A.U.C., placed a dollar amount on range lands distributed to the mixed-bloods, including the land which essentially became assets of the range corporations. The 172,000 acres of land which went into the corporations had a value, based on the Moore appraisal, of $492,000, each corporation receiving land, although in different quantities, of the same value, i.e. $246,000. The book value

of each share worked out to be roughly $500. Plaintiffs claim that the "Moore appraisal" was not intended to place a fair market value on the range lands, but to arrive at a value index, in order that a one-on-one relationship between shares of stock in each of the corporations might be maintained. Plaintiffs arguments in that regard are unpersuasive. The appraisal on its face indicates that its purpose was "to estimate the fair market value for the surface right for the subject property". The overwhelming weight of the evidence indicates that Mr. Moore, the B.I.A., the Bank, the mixed-bloods and the tribe viewed it as establishing the value of the land. Moreover, it appears that the Bank was justified in relying on the appraisal. The appraisal was a conscientious one. Mr. Moore

testified that he spent 16 days physically on the land and another 30 days examining comparable sales. Although plaintiffs claim that the Bank should have undertaken an independent appraisal of the land, the Bank's reliance on the Moore appraisal was not a breach of its fiduciary duty. While a new appraisal might have fine-tuned the value of the land in view of the lapse of two years between the appraisal and the sale of the stock, it does not appear that the Bank's decision to offer the stock at 10% over its 1958 appraised value was unreasonable in view of the expense to the trust of a second undertaking and its ability to use the 1958 base to project 1960 values.

The plaintiffs also contend that the range lands carried with them hunting, fishing, water and timber rights not taken

into consideration in the Moore appraisal, or reflected in the price at which the stock was sold. Plaintiffs do not appear to allege that the Bank wrongfully disregarded these "intangible rights" when it sold the stock, but assert them as an element of damage. It is clear from the record that the trustee Bank did not consider anything more than the surface rights to the range lands when it set the price for the shares. If these "intangible rights" ran with the land, and if the Bank was charged with knowledge of that fact, plaintiffs possess a colorable claim against the Bank.[16/] However, plaintiffs fail in their burden to establish that these rights were appurtenant to the range lands, or that they were deprived of them by virtue of their sale of the range stock.

In support of their contention that these intangible rights were appurtenant to the range land, plaintiffs rely exclusively on the decision of the Court of Claims in the case of Affiliated Ute Citizens v. United States, (No. 156-69 Appendix A, Ct. of Claims, 1977). That case arose when the United States allegedly claimed absolute title to the water, timber and game rights on lands which included those placed in the range corporations. The A.U.C. argued before the Court of Claims that the United States breached its duty to the mixed-bloods when it allegedly failed to distribute such rights to them. As to these, the issue confronting the Court of Claims was whether the action was barred by the statute of limitations. If the

"intangible rights" had been distributed to the mixed-bloods in 1961, the A.U.C. claim was untimely as the United States' duty to the mixed-bloods ended, in the view of the court, when all the assets were divided. The court held that the claim was in fact time-barred, stating that the "division and distribution of assets ... were effected by 1961, all intangible assets being conveyed either in the form of shares in the Ute Distribution Corporation (U.D.C.) or as appurtenant to land ... ." Id. at A-2. From this decision, plaintiffs reason that the Court of Claims held that the intangible rights ran with the range land and were lost with the sale of the land. However, such reliance is insufficient to sustain their burden in this instance. First, the Bank, and this court, are not bound by the decision in

the Court of Claims. At most it is stare decisis. Moreover, the Court of Claims held only that the intangible rights were in fact distributed, either by appurtenance to the land or to the U.D.S. It is not clear from the record before this court where they went if they were distributed at all. The Termination Act required that all "assets not susceptible to equitable distribution and practicable distribution shall be managed jointly by the Tribal Business Committee and the authorized representative of the mixed-blood group,"[17/] i.e. the U.D.C. At the least, the water and timber rights were arguably unsusceptible to practicable distribution. Moreover, the articles of incorporation of the range corporations make no reference to the intangible rights and thus do not empower the corporation to

develop them for the benefit of the shareholders. Indeed, the shareholders would expect no distribution of any kind from the range corporations. Consequently, the decision of the Court of Claims does not demonstrate by a preponderance of the evidence that the intangible assets underlay the shares of stock in the range corporations.

B. Failure to Test the Market

The plaintiffs are on somewhat more solid ground in their claim that the Bank failed to ensure that they obtained the best price possible for the shares. They claim the Bank should have ascertained prior to its offer, the maximum Mrs. Sprouse, for instance, would have paid. There is evidence which indicates that Mrs. Sprouse was willing to pay as much as $1,500 a unit, and had the resources

available to accomplish the purchase of a controlling interest in the corporations. Although the Department of Interior invalidated Mrs. Sprouse's initial offer, that did not preclude her purchase of shares after an offer had been made to the qualified Indian offerees and remained unaccepted by them. It is conceivable that the Bank could have secured a better price for the shares had it initially offered the stock at a higher price. In that event, if the tribe did not accept the offer, Mrs. Sprouse or another may have done so. If neither the tribe nor Mrs. Sprouse were willing to purchase, then the price could have been adjusted downward.

In retrospect, the initial procedure followed by the Bank seems hurried, but not a breach of trust. At the time of the

trustee Bank's offer to sell for $1,100 per unit, there is insufficient evidence that anyone other than Mrs. Sprouse could, or was willing to compete with the tribe in the purchase. Mrs. Sprouse, at the time of the Bank's offer, was an eligible purchaser so far as the trustee Bank knew. If both she and the tribe accepted the trustee Bank's offer, the trustee Bank had every reason to expect that the sealed-bid procedures [18/] would enable it to secure a competitive price. When the Department of Interior invalidated Mrs. Sprouse's acceptance, post-acceptance competition among purchasers was extinguished and the trustee Bank was bound to convey to the remaining acceptor, the tribe. That the trustee Bank chose to obtain a competitive price by means of the sealed bid procedure, rather than by setting a high

price at the outset was in retrospect, a poorer procedure. But, in the absence of evidence of other serious prospective purchasers and because the Bank could reasonably rely on the Moore appraisal in fixing the sale price, there was no breach of fiduciary duty to the trust beneficiaries.

II. Statutes of Limitation

Plaintiffs filed their complaint on July 17, 1975. By March 9, 1961, the trustee Bank had completed the block sale of 147 units to the tribe. By May of 1963, the tribe had purchased substantially all of the shares initially held by the mixedbloods. In Utah, a claim arising under Rule 10b-5 must be brought within three years of the occurrence of the fraud. [19/] The maximum limitation period relevant to plaintiffs' pendent claims is

four years.[20/] On its face, then, plaintiffs' complaint was un-timely filed and it is plaintiffs' burden to demonstrate the existence of circumstances that would toll the limitation period. Plaintiffs attempt to meet this burden is three pronged; they allege that they didn't know; that they didn't have reason to know; and that the Bank is stopped from denying that they knew or had notice of the Bank's acts that would have been sufficient to put them on notice of their claims against the Bank.

A. Plaintiffs' Knowledge

The major contention of the plaintiffs is that the trustee Bank conspired with the tribe in order to secure for the tribe its control of the range corporations shares at an inadequate price. By 1961, the plaintiffs knew that the Bank

had sold the stock which it held in trust to the tribe for $1,100 per unit. They knew or should have known prior to that time that the tribe was desirous of acquiring, and was authorized by the B.I.A. to acquire control of the range lands. By early 1965, at the very latest, they knew or should have known that the tribe, by then long a majority holder of the range corporation's stock, intended to dissolve the corporations. Viewing the evidence in the light most favorable to the plaintiffs, it appears that their argument is that the Bank failed to inform plaintiffs that the Bank's actions violated the securities laws and the Bank's fiduciary duty.

Moreover, in March of 1969, six years prior to instituting the instant action, the plaintiffs [21/] filed suit against the

United States in the Court of Claims alleging inter alia, that the United States breached its duty to the mixed-bloods by failing to afford them counsel independent of the tribe and that they:

> were individually deprived of their interests in various allotted lands and animal and grazing rights which said counsel with the approval, consent, and authorization of the United States, caused or permitted them to convey to said tribe without adequately advising of their rights or requiring the payment of adequate compensation for said lands and animal and grazing rights. (Petition, para. 12)

If the trust beneficiaries in 1969 were of the belief that they had been deprived of the rights when the stock was sold, and knew that the trustee Bank charged to secure their best interests, had sold the stock, it is difficult to conceive of what they knew in 1972 and thereafter that they didn't know in 1969. 22/

B. Collateral Estoppel

Next, plaintiff contends that defendant is precluded by the doctrine of collateral estoppel to assert that plaintiffs knew or should have known of the alleged fraud prior to April of 1972. In support of this assertion, plaintiff maintains that another judge held, in the case of Miera v. First Security Bank of Utah, (C-126-73, D. Utah), a case yet pending before this court, that the plaintiffs in that case, virtually identical to plaintiffs here, could not have known of the fraud alleged in Miera until the United States Supreme Court rendered its decision in Affiliated Ute, supra; and for a reasonable time thereafter.

The Miera case, like the Affiliated Ute case, and unlike this case, involves a claim that the Bank, while acting as

transfer agent in the sale of stock in the Ute Distribution Company, engaged in market-making activities with respect to that stock, and by way of material misrepresentations and omissions, induced certain mixed-bloods to sell their shares at an inadequate price. It is clear from the record in Miera that the presiding judge made no "holding" to the effect that it was only the Supreme Court decision that could have imparted notice to the plaintiffs in Miera of the fraud alleged there. [23/] However, even if it had been so held, and even if it could be said that only a decision by the highest court in the land was sufficient to impart notice of the claim alleged in Miera, such holding would be of no avail to plaintiffs in this case. First, to decide that the plaintiffs in Miera were unaware of their

claim against the Bank for activities surrounding the transfer of U.D.C. stock is not to decide that the plaintiffs in this case were concurrently unaware of this claim against the Bank for activities surrounding the sale of stock in the range corporations. There is no identity of issues. Second, any order so far entered in Miera can have no collateral effect for the reason that no final judgment has been entered in that case.[24/] Each case is to be decided on its own merits.

C. Legal Incapacity Imparted to Minor Beneficiaries.

By its terms, the trust relationship between the Bank and a minor beneficiary ended when the minor attained the age of 21. As to those beneficiaries who reached the age of 21 beyond the period of the statute of limitations, their claims are

time-barred. Thirty-four of the beneficiaries whose stock was sold by the trustee Bank did not attain their majority until after the beginning of the four-year period prior to the filing of this action. Plaintiffs contend that the limitation period was tolled during the minority of these 34 beneficiaries and thus the statute of limitation is inapplicable. Defendants contend that by virtue of a 1968 agreement entered into between the A.U.C. and counsel who represented it in the Court of Claims and before this court, whereby said counsel and another attorney agreed to act as exclusive legal counsel for the A.U.C. for a period of ten years, the knowledge of counsel in the case was imputed to the minors irrespective of their minority.

Section 78-12-36 Utah Code Annotated (1953) states as follows:

> Effect of disability. -- If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, either:
>
> (1) Under the age of majority; or,
> (2) Mentally incompetent and without a legal guardian; or
> (3) Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than for life; --
>
> The time of such disability is not a part of the time limited for the commencement of the action.

No mention is made in the statute of circumstances where tolling does not occur if a person is under the age of majority. Defendant suggests it does not occur if a guardian is appointed or parents are available to actively pursue a claim, citing Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975) and Forrer v. Reed, 560

P.2d 1113 (Utah 1977). The cases cited are, at best, peripheral. The Greenhalgh [25/] case, recognized as a matter of state policy, the priority of notice requirements over disability status where a minor had parents available to actively pursue a claim against the state; Forrer merely recognizes but did not hold that some courts have said that statute of limitations begins to run when a guardian is appointed; Forrer refers to Jenkins v. Jensen, 24 Utah 108, 66 P. 773 (1901); which is of no help here. That case held that where a trustee who has a sole right to bring an action is time-barred, the beneficiaries are time-barred. Here, of course, the beneficiaries are suing the trustee and the claims are not just pendent state claims but federal claims as well.

At best, there remain 34 minor beneficiaries represented by plaintiff, not expressly time-barred by the applicable statute of limitations when considered in relationship to § 78-12-36, Utah Code Annotated, (1953). As to them, the statute of limitations may well have tolled. At this juncture, I need not decide that question either as a matter of state law nor as a matter of federal law in view of the fact that we have dealt with the substantive questions presented in this case on their merits.

III. The Claim Common to the Adults and Beneficiaries.

In this sixth cause of action, plaintiffs represent the entire mixed-blood group, trust beneficiaries and non-beneficiaries, and claim that the Bank conspired with the tribe and others to

deprive the mixed-bloods of their rights, and aided and abetted the tribe in a scheme to obtain the shares in violation of Rule 10b-5, and breached a fiduciary duty to the adults. The first two of these claims can summarily be disposed of. As to the claim of conspiracy, there was no unlawful object. There was nothing per se unlawful about the tribe's acquisition of the range shares. And while plaintiffs claim that the unlawful object was the failure to inform the mixed-bloods of the tribe's design, the evidence indicates that the tribe was open in its attempt to acquire a majority interest in the range corporations. Knowledge of that end was pervasive.

Regarding the claim of aiding and abetting, the necessary element of a Rule 10b-5 violation on the part of the tribe

is absent. The tribe merely accepted the mixed-bloods offers to sell, and never attempted to conceal its intent to acquire the range shares. Moreover, there was no security involved and thus there could then be no violation of Rule 10b-5.

As to plaintiffs claim that the Bank owed a fiduciary duty to mixed-bloods who were not trust beneficiaries, the evidence discloses no such a duty. The plaintiffs would infer a duty from the Bank's role as transfer agent of the range company stock. Such did not impose a duty to disclose nor did the Bank undertake to advise the adults as to the sales of their shares or the price thereof in any meaningful way. It was the mixed-bloods themselves who decided to sell and made the offers of sale. Also, the failure of certain of the trust beneficiaries to overcome their

burden of establishing that the statute of limitations was tolled is common to the adults. In short, the claims of the adults, if any, are time-barred.

I have examined the claims relating to trustee Bank's failure to exercise its re-purchase option and the reasons set forth for electing not to do so appear reasonable and unactionable under the circumstances. Certainly, such in no sense taints the sale by trustee Bank of 147 share units in a block to the Ute Indian Tribe.

The proxy and tender offer claims are without merit.

The role of the attorney for the Ute Indian Tribe is referred to. I merely note that he is not a party to this action.

This memorandum opinion shall constitute the Findings of Fact and Conclusions of Law in this matter.

The complaint should be dismissed and judgment entered in favor of defendant and against plaintiffs.

DATED this 6th day of March, 1981.

BY THE COURT:
Bruce Jenkins
United States
District Court

1/ 48 Stat. 881, 15 U.S.C. § 78a et seq.

2/ 68 Stat. 868, 25 U.S.C. § 677 et seq.

3/ Members of the Ute Tribe could become mixed-bloods by choice irrespective of their ancestry.

4/ 25 U.S.C. § 677i provides in part as follows: "The tribal business committee representing the full-blood group, and the authorized representatives of the mixed-blood group, within sixty days after the publication of the final membership roll, as provided in § 677g of this title, shall commence a division of the assets of the tribe that are then susceptible to equitable and practicable distribution. Such division shall be by agreement between them subject to the approval of the Secretary. Said division shall be based upon the relative number of persons comprising the final membership roll of each group. After such division the rights or beneficial interests in tribal property of each mixed-blood person whose name appears on the roll shall constitute an undivided interest in and to such property which may be inherited or bequeathed, but shall be subject to alienation or encumbrance before the transfer of title to such tribal property only as provided in §§ 677-677aa of this title. Any contract made in violation of this section shall be null and void. xxx xxx."

5/ It appears that between 100 and 150 mixed-bloods sold their stock by "private treaty". Those sales of which record is

available indicate that the sale prices ranged for $100 to $650 per unit, i.e. one share of each corporation.

6/ Section 15 of the Termination Act states in relevant part: In the event a member of the mixed-blood group determines to dispose of his interest in said real property at any time within ten years from the date of enactment of this Act, he shall first offer it to members of the tribe, and no sale of any interest, prior to termination of Federal supervision shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary.

Section 5 of the Termination Act states that after the publication of the final roll, the tribe "shall thereafter consist exclusively of full-blood members". The Office of the Solicitor of the Department of Interior was requested by the Commissioners of the B.I.A. to interpret the term "tribe" as used in Section 15, apparently because of some confusion as to whether the mixed-bloods were required to offer their interests in real property only to the full-blood members, or to both the full-blood and mixed-blood members. The Solicitor's Office interpreted the term "tribe" to include both for purposes of Section 15. This opinion is reflected in the Articles of Incorporation of the range corporations, which require an offer "to the members of the tribe, including the mixed-blood and full-blood members thereof" prior to a shareholder's sale of the stock.

7/ Many of those who had purchased rights by "private treaty" submitted forms to the Superintendent memorializing the transactions and requesting his approval. The Superintendent did so in many cases. After he had been replaced, he explained his reasons for doing so to the Area Director in a letter dated August 10, 1960.

> [My approval] was requested in order to strengthen their position in getting the seller of a later date to actually endorse the stock certificates over to the purchaser. My approval was an accommodation to the purchaser in this respect only and was not to be construed as an approval of the sale price .... It was explained that the regulations covering the movement of the stock had not as yet been promulgated and approved, and a reverse action by the operation of the regulations as approved by the Secretary of Interior could happen in this instance.

8/ 25 C.F.R. § 243.

9/ The prescribed manner included the following: (1) the seller notified the Superintendent of his desire to sell and his terms (§ 243.5); (2) The Superintendent notified the range corporations and the Tribal Business Committee of the offer, and posted it (§ 243.6); (3) Upon acceptance by two or more members, the Superintendent was to call for sealed bids from them and the sale made to the highest bidder bidding in excess of the offering

price (§ 243.7); (4) If the offer was not accepted by a member of the tribe, the offeror had six months to sell the shares to any person at a price greater than or equal to the offering price before he had to re-offer it to the members of the tribe (§§ 243.7, 243.8)

10/ In a letter to the Commissioner of the B.I.A. dated December 16, 1959, the Area Director recommended that the regulations include a provision authorizing "private treaties". The Commissioner, responded by letter of August 16, 1960, after the regulations had been adopted, and informed the Area Director that although his recommendation had been considered, the Termination Act did not contemplate "private treaties".

11/ Although the regulations defined "tribe" as the Ute Indian Tribe, and "member of the tribe" as "all mixed-blood and full-blood members", it is clear that the term "tribe" as used in the Act referred only to the full-bloods collectively. See n.6, supra.

12/ At that time, the A.U.C. was considering the possibility of dissolving the range corporations and selling the land to the tribe. On June 27, 1960, the A.U.C. Board of Directors circulated a letter directed to all of the mixed-bloods informing them that the tribe had received authority to purchase the land or stock in the range corporations. The letter inquired whether the members would be willing to sell to the tribe and enclosed

a ballot by which they could express their preference.

13/ See note 12, supra.

14/ The telegram disclosed that the stated rationale for this interpretation was the fact that the regulations required the Superintendent to notify the Tribal Business Committee of all mixed-blood offers to sell the range company shares. See note 9, supra.

15/ In his earlier letter of August 17, the Area Director had informed the Commissioner that it was the opinion of John Boyden that the bank would be willing to sell to the tribe the shares it held in trust.

16/ Of these 34, 16 were yet trust beneficiaries. After the initial block sale, the Bank held stock for 27 beneficiaries. The record does not disclose in all instances what occurred with respect to the other 11 shares. At least some of the 27 beneficiaries attained their majority between the time of the block sale and the time the corporations were dissolved. There is no evidence that, after the initial sale, the Bank sold any shares without the permission of the beneficiary or of his parents.

17/ As a result of these distributions, 28 mixed-bloods received an undivided interest in approximately 14,000 acres of range land, nine received an individual

interest 1,520 acres, and two shares 520 acres.

18/ 15 U.S.C. § 78j(b).

19/ 17 C.F.R. § 240.10b-5.

20/ Section 33-2-2, Utah Code Ann. (1953) require fiduciaries to act prudently in administering the property of others.

21/ Plaintiffs also claim that the Bank's actions violated certain regulations promulgated by the Comptroller of the Currency pursuant to 12 U.S.C. § 92A, and the Utah Uniform Securities Act. The plaintiffs have argued neither of these claims and they will not be considered.

1/ 430 U.S. at 474, n. 14.

2/ 430 U.S. at 474 footnote 14 appeared as follows: In addition to their principal argument that the complaint alleges a fraud under clauses (a) and (c) of Rule 10b-5, respondents also argue that the complaint alleges non-disclosure and misrepresentation in violation of clause (b) of the Rule. Their major contention in this respect is that the majority stockholder's failure to give the minority advance notice of the merger was a material non-disclosure, even though the Delaware Shortform merger statute does not require such notice. Brief for Respondents 27. But respondents do not indicate how they might have acted differently had they had prior notice of the merger. Indeed, they accept the conclusion of both courts below that under Delaware law they could not have enjoined the merger because an appraisal proceeding is their sole remedy in the Delaware courts for any alleged unfairness in the terms of the merger. Thus, the failure to give advance notice was not a material non-disclosure within the meaning of the statute or the Rule. [citation omitted]

Arguably, footnote 14 requires plaintiffs to allege, as part of their cause of action under Rule 10b-5, what action they would have undertaken but for the non-disclosure. They have not done this.

3/ While the existence of this duty seems to be the logical inference to be drawn

from the Santa Fe Court's analysis of the plaintiffs' claim based on the failure to receive advance notice, it is somewhat difficult to reconcile with the court's reluctance, expressed later in the opinion, to "federalize the substantial portion of the law of corporations that deals with transactions in securities." 430 U.S. at 479. In Santa Fe, the majority shareholder's decision to squeeze out the minority, in and of itself, was not enjoinable under Delaware law because it was authorized and thus "fair" under Delaware law. However, seemingly all state courts could enjoin action on the part of majority shareholders unfair under state law. Since few self dealers announce their ill intentions in advance, and thus few minority shareholders will be given an opportunity to seek preliminary relief in state court, a breach of state law fiduciary duty involving securities will almost always contain an element of actionable Rule 10b-5 deception under Santa Fe. See Goldberg v. Meridor, 567 F2d 209 225 (2nd Cir, 1977), (Meskill, J., dissenting) cert. denied, 434 U.S. 1069 (1978). Nonetheless, it appears that only the forum, not the substantive law of corporations, would be thus federalized. Footnote 14 has stimulated considerable controversy in the federal courts. Compare Biesenbach v. Guenther, 588 F.2d 400, 402 (3rd Cir. 1978) and Kerrigan v. Merrill, Lynch, Pierce, Fenner & Smith, 450 F.Supp. 639, 644 (S.D.N.Y. 1978), with Healy v. Catalyst Recovery of Pennsylvania, Inc., 616 F.2d 641, 646 (3rd Cir. 1980) and Klamberg v. Roth, 473 F. Supp.

544, 551 (S.D.N.Y. 1979). See also Kidwell Ex Rel. Penfold v. Neikle, 597 F.2d 1273 (9th Cir. 1979); Goldberg v. Meridor, supra; Wright v. Heizer Corp., 560 F2d 236 (7th Cir. 1977), cert. denied, 434 U.S. 1066 (1978). Among the three last cited cases, Goldberg required advance disclosure of a transaction to minority shareholders if the transaction was enjoinable in state court; Kidwell and Wright require a plaintiff to show that his request for an injunction in state court would have been successful.

4/ A corporation can act only through its agents, normally directors. Generally, the fiduciary duty owed to a corporation by its directors extends beyond the duty to avoid self dealing, but require that a director fully disclose to the corporation, normally personified in the other directors, all facts known to him which are noticed for a transaction. 3 W. Fletcher, Cyclopedia of the Law of Private Corporations §§ 790 at 12,808 at 56 (rev. perm. ed. 1975). Only then can a corporation, through its board, act in its own best interests. Under agency law principles, the knowledge of the directors is imputed to the corporation. However, agency law does not extend this fiction to instances in which a director acts in conflict with the corporations interest, 3 W. Fletcher § 819, supra. Thus, it is not too abstract to speak in terms of deceiving the corporation. In those situations, courts have deemed the minority shareholders representatives of the corporation's capacity to be deceived. See e.g.

Schoenbaum v. Firstbrook, 405 F. 2d 215, 220 (2nd cir. 1968) (en banc) (adopting the position taken by Judge Hays' dissenting opinion in the earlier panel decision in Schoenbaum v. Firstbrook, 405 F2d 200, 214 (2nd Cir. 1968). See generally, Note, Suits for Breach of Fiduciary Duty Under Rule 10b-5 After Santa Fe Industries, Inc. v. Green, 91 Harve. L. Rev. 1874, 19882-83 (1978).

5/ Rule 17 (b), Utah Rules of Civil Procedure: Rule 17(c), Federal Rules of Civil Procedure.

6/ Plaintiffs, throughout this case, do not really characterize the alleged failures of the Bank in terms of disclosure. For instance, the only allegation in the complaint that can be construed as alleging a failure to disclose is the claim that the bank "knew that the plaintiffs ... were unaware that [they] would be denied their historical hunting and fishing and water rights" if their stock was sold. See p. 22 infra for a discussion of these claims. Moreover, in plaintiffs lengthy trial memorandum and post-trial memoranda, no specific instances of non-disclosure are claimed. In fact, plaintiffs' trial memorandum characterizes the Bank's circulation of the questionnaires containing information concerning the sale of the stock to the Tribe as "a consideration of doubtful relevance considering [the minor's] known limited abilities which was the purpose of the trust in the first place." Plaintiffs Trial Memorandum at 58.

7/ It is clear from the facts of the case that the $1,100 figure had as its basis the Moore appraisal of the range land from which a price of $1,000 per unit had been calculated. The Moore appraisal had been commissioned and paid for by the mixed-blood group and, after it had been completed, was explained to many of them at a general membership meeting. Copies of it were apparently available. Consequently, the beneficiaries had available to them a reference from which to ascertain the advisability of disposing of their shares at the price disclosed to them by the Bank.

8/ Aside from the fact that the Bank informed the beneficiaries that their share would likely be purchased by the Ute Tribe, it was common knowledge that the Tribe was interested in purchasing a controlling interest in the range corporations. See e.g. Plaintiffs Ex. 324. At one point prior to the Bank's offer, the mixed-bloods considered selling all of the rangelands held by the corporation to the Ute Tribe, and ballots were sent to eligible AUC voters to determine their preference in this regard.

9/ See Minutes, Affiliated Ute Citizens Board of Directors, September 19, 1960.

10/ According to Department of Interior Regulations, each offer of sale was required to be posted conspicuously, for a period of at least 10 days in the Uintah and Ouray Agency Office at Fort Duchesne, and in the Post Offices of the towns of

Roosevelt, Whiterocks, Randelett, Myton and Fort Duchesne. 25 C.F.R. § 243.6.

11/ 15 U.S.C. § 78a et seq.

12/ 15 U.S.C. § 78c(a)(10).

13/ The definition of a security in § 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1), is virtually identical to that contained in § 3(a)(10) of the 1934 Act and may be considered the same. See United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 834 n. 12 (1975).

14/ See United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 857 n. 24 (1975).

15/ In Silver Hills, investors purchased memberships in a country club to be developed by the promoters. Members were not to be permitted to share in the profits, but would have only the right to use the facilities once they were completed. The venture was expected to result in profit for the promoters; it was only the members who could expect no profit in the traditional sense.

16/ On its face, the transaction between the tribe and the Bank involved only shares. These shares only permit the holder to graze stock on the range lands. The sale of the shares is not the same as the sale of the underlying assets.

17/ 25 U.S.C. § 677i.

18/ See 25 C.F.R. § 243.7.

19/ By reference to § 78-12-26(3), Utah Code Annotated (1953) (actions based on fraud or mistake) See Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969).

20/ The action based upon breach of statutory fiduciary duty has a limitation period of three years. § 78-12-26(4), Utah Code Annotated (1953). Defendants positions and the plaintiffs do not dispute that the action based upon the breach of common law fiduciary duty has a limitation period of four years. However, it is not clear that the common law claim is an "action not otherwise provided for by law" within the meaning of § 78-12 25's four-year period.

21/ The A.U.C. brought the action as the authorized representative of the mixed-blood group.

22/ Plaintiffs argue that the Court of Claims action is irrelevant to the question of what they knew and should have known about the activities of the Bank. They first contend that the individual mixed-bloods were not parties to the action, but only the A.U.C. in its representative capacity. Thus the action did not necessarily impart notice to the individual plaintiffs here. This argument fails for a number of reasons. (1) The A.U.C. asserted the rights of the individuals when it claimed that the mixed-bloods were damaged by the sale of the range shares. The A.U.C. as an entity suffered no damage as a result of the

sale. (2) Counsel for plaintiffs in this action was counsel for the A.U.C. in the Court of Claims proceedings. (3) The evidence does not support the conclusion that the individual members were in fact unaware of the nature of the claims presented to the Court of Claims. (4) Even if the individual mixed-bloods or some of them were in fact unaware of the Court of Claims action, the facts upon which the Court of Claims action was based were available to them and notice thus charged to them.

Plaintiffs also contend that their claim before the Court of Claims that they are deprived of their interests in animal and grazing rights" when they "conveyed" them to the tribe refers to the initial division of assets between the mixed-bloods and full-bloods, not to the sale of the range shares. It is difficult to conceive that during the division of tribal assets, where title to assets retained by the tribe (full-bloods) remained in the United States, such could be termed a conveyance by the mixed-bloods to the tribe. Moreover, in 1970, in answers to interrogatories propounded by the United States, in the case before the Court of Claims, counsel for the A.U.C. stated:

> Each and every member of plaintiff A.U.C. ... was deprived of grazing rights ... by the manner in which his grazing rights were "purchased" by the tribe. The tribe purchased all of the grazing rights from the

> individual plaintiffs. ... The defendant advised the plaintiffs that the purchase price was fair and equitable and had been determined by independent appraisal. ... Plaintiffs ... believe ... and ... allege that the price they received for their grazing rights and stock in the two grazing corporations ... was grossly inadequate, to their very substantial individual loss and damage.

Finally, it is plaintiffs' contention in this case that the Court of Claims, when it dismissed their suit as untimely filed, implicitly determined that the water, hunting, fishing and timber rights were appurtenant to the land distributed to the mixed-bloods. They thus rely on that dismissal as proof that those intangible rights were appurtenant to the range shares and added to their injury when the shares were sold. See p. 7 infra. That position is inconsistent with their argument that the only injury alleged by the A.U.C. in the suit before the Court of Claims surrounded the devision of tribal assets. There can be little doubt but that the A.U.C. urged to the Court of Claims that the mixed-bloods suffered injury by virtue of the sale of the range company shares. Plaintiffs also suggest that prior to the Court of Claims decision in 1972, they were of the belief that it was the United States who deprived them of their rights in the intangibles by their failure to distribute them. It was only when they allegedly "learned" from the

Court of Claims that all such assets had been distributed to them, that they became aware that the Bank, not the United States, had defrauded them. This argument is specious. Ignorance of the legal character of the Bank's activities does not toll the statute of limitations. Moreover, plaintiffs do not allege that the Bank knew or should have known of the alleged appurtenance of the intangibles.

23/ In the Miera plaintiffs' memorandum of October 2, 1973, it is stated that the judge presiding over the case "expressed the tentative conclusion at the hearing on July 26, 1973 that these plaintiffs were not reasonably charged with notice of their claims until after the Supreme Court decision on April 14, 1972". No ruling resulted from that hearing. At most, the "tentative conclusion" was a remark.

24/ See Rule 54(b), Federal Rules of Civil Procedure; United States v. Young, (slip op.) (No. 79-2101, 10th Cir., 1980).

25/ The holding on the main issue in Greenhalgh has been legislatively overruled. Standiford v. Salt Lake City Corp., 605 P.2d 1230, 1232 n. 1 (Utah 1980).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

RANDOLPH C. HACKFORD, LAWANNA KAY REED THOMPSON, ALLEN D. REYOS, and ORANNA BUMGARNER MOOSMAN, for themselves and on behalf of all other persons similary situated,	)	Civil No. C 75-278
Plaintiffs,	)	
vs.	)	MEMORANDUM ORDER
FIRST SECURITY BANK OF UTAH, N.A.,	)	
Defendant.	)	

On March 6, 1981, this Court issued a memorandum Opinion deciding the above-entitled action upon the merits. Since then, the parties have filed several motions and memoranda, which have been received as follows:

1.	March 16, 1981	PLAINTIFFS' Alternative Motion for a New Trial, Reconsideration of Various Holdings and for Amendment of the Findings
2.	March 17, 1981	PLAINTIFFS' Memorandum in Support of (1.)
3.	March 23, 1981	DEFENDANT'S Motion to Deny or Limit withdrawal of Class Members
4.	March 23, 1981	DEFENDANT'S memorandum in Support of (3.)
5.	April 8, 1981	PLAINTIFFS' Affidavit of Parker M. Nielson and book "Of Worthier Blood (manuscript 1981)"
6.	April 10, 1981	DEFENDANT'S Motion to Strike the Affidavit and book
7.	April 10, 1981	DEFENDANT'S Memorandum in Support of (6.)
8.	April 13, 1981	DEFENDANT'S memorandum in Opposition to (1.)

The plaintiffs' alternative motion for new trial, etc., came on for hearing before this Court on April 13, 1981, at which time the arguments of counsel were

heard and the motion was taken under advisement. Subsequent to that hearing, the following documents were filed with this Court:

9.	April 28, 1981	PLAINTIFFS' Supplemental Memorandum Concerning Testimonial Evidence in Support of Reconsideration or Amendment of Findings
10.	May 1, 1981	DEFENDANT'S Motion to Strike the Plaintiffs' Supplemental Memorandum
11.	May 1, 1981	DEFENDANT'S Memorandum in Support of (10.)
12.	May 15, 1981	PLAINTIFFS' Response to Defendant's motion to Strike Supplemental Memorandum

On May 19, 1981, this Court received a letter from defendant's counsel requesting leave to file a reply brief if the motion to strike the plaintiffs' supplemental memorandum is denied.

Further, this Court has received numerous documents, entitled "Notice of withdrawal as Named Plaintiff or member of Plaintiff Class," apparently signed by 24 members of the plaintiff class without the aid of plaintiffs' counsel. While the defendant has filed a motion seeking to deny or limit such withdrawal of the Plaintiff class members, more than 90 days have passed without a response to the motion from the dissenting class members or anyone representing them.

Having heard and considered the arguments of counsel, having reviewed the extensive motions and memoranda noted above, and having again reviewed the voluminous trial record and files in the above-entitled action this Court now rules on the parties' respective motions as follows:

I. PLAINTIFFS' ALTERNATIVE MOTION FOR A NEW TRIAL, RECONSIDERATION OF VARIOUS HOLDINGS AND FOR AMENDMENT OF THE FINDINGS

The motion for a new trial is denied. The motion to reconsider/amend various findings and conclusions is also denied in all of its particulars. The concern that seems most central to the plaintiffs' objections to this Court's findings and conclusions regards the issue of the duty of the defendant as trustee. Plaintiffs would now hold the defendant bank to have been governed by trust duties far more stringent than those that were found to be applicable by this Court. No express provision for such strict duties is found in the text of the relevant documents. Nor does logic demand the adoption of the plaintiffs' view. Even assuming that the defendant bank was charged with the same high standard of care that governs the

conduct of the federal government in its dealings with Indians and their lands, the plaintiffs would still be denied recovery. If the United States itself, as trustee of the lands at issue until their transfer under the Termination Act, had executed a similar sale of interests in the grazing properties, the appropriate inquiry for a court to have made is whether the government had made "a good faith effort to give the Indians the full value of their lands" United States v. Sioux Nation of Indians 448 U.S. 371, 416 (1980), accomplishing "a mere change in the form of investment" of Indian property. Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903). Looking to the adequacy of the consideration given for the transfer of the shares herein plaintiffs offer little that persuades this Court to the view that the disputed transactions were beyond the

lawful exercise of the defendant bank's powers as trustee, even under the standards made applicable to the United States as the Indians' trustee under United States v. Sioux Nation of Indians, supra.

Certainly the omniscient powers of hindsight might lead concerned policy makers to a different approach to the terminated Utes' rangeland interests, if those transactions could be rewritten at this point. At that time, however, Congress was pursuing the removal of trust restrictions from the management of Indian property and the termination of federal supervision over Indians' personal business transactions rather than the tightening of restrictions and the redoubling of supervision by a trustee, be it government or bank. C. Wilkinson and E. Biggs, "The Evolution of Termination Policy," 5 American Indian L. Rev. 139 (1977). The

plaintiffs ask this Court to infer the stricter view without express support in the record and contrary to the contemporaneous intent of the legislative program set forth in 25 U.S.C. § 677 et seq. This the Court simply cannot do.

This Court finds adequate support in the record for the findings and conclusions stated in its Memorandum Opinion of March 6, 1981, with no adequate cause for amendment appearing therein.

II. DEFENDANT'S MOTION TO STRIKE THE AFFIDAVIT AND BOOK OF PARKER M. NEILSON

While this Court appreciates the effort put into the submitted manuscript by the counsel for the plaintiffs, it is constrained to agree with the defendants that its submission at this point in the above-entitled action is inappropriate. The motion to strike is granted.

III. DEFENDANT'S MOTION TO STRIKE THE SUPPLEMENTAL MEMORANDUM SUBMITTED BY PLAINTIFFS

The motion to strike the supplemental memorandum submitted by the plaintiffs in support of their motion for new trial, etc., is denied. Leave to file a reply memorandum is denied.

IV. DEFENDANT'S MOTION TO DENY OR LIMIT WITHDRAWAL OF CLASS MEMBERS

The plaintiff class in the above-entitled action was finally certified by Order of this Court on March 24, 1977. Notices of withdrawal filed nearly four years later, following trial and adjudication of the action on the merits, are untimely per se and are hereby determined to be without force and effect. All members of the plaintiff class who failed to timely withdraw from the class shall be bound by this Court's judgment in this action.

SO ORDERED this 30th day of June, 1981.

BY THE COURT:
Bruce S. Jenkins
United States District Judge

Copies mailed to counsel 6/30/81: nw
Paul Nielson, Esq.
Paul Moxley, Esq.
James S. Jardine, Esq.

APPENDIX E

PERTINENT PROVISIONS OF THE UTE TERMINATION ACT (25 U.S.C. §§677-677aa)

Enacted August 27, 1954, 68 Stat. 868

§ 677. *Purpose*

The purpose of sections 677 677aa of this title is to provide for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property.

§ 677a. *Definitions*

For the purposes of section 677-677aa of this title—

(a) "Tribe" means the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah.

(b) "Full-blood" means a member of the tribe who possesses one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half, excepting those who become mixed-bloods by choice under the provisions of section 677c of this title.

(c) "Mixed-blood" means a member of the tribe who does not possess sufficient Indian or Ute Indian blood to fall within the full-blood class as herein defined, and those who become mixed-bloods by choice under the provisions of section 677c of this title.

(d) "Secretary" means Secretary of the Interior.

(e) "Superintendent" means the Superintendent of the Uintah and Ouray Reservation, Utah.

(f) "Asset" means any property of the tribe, real, personal or mixed, whether held by the tribe or by the United States in trust for the tribe, or subject to a restriction against alienation imposed by the United States.

(g) "Adult" means a member of the tribe who has attained the age of twenty-one years.

§ 677b. *Method of determining Ute Indian blood*

For the purposes of sections 677-677c of this title Ute Indian blood shall be determined in accordance with the constitution and bylaws of the tribe and all tribal ordinances in force and effect on August 27, 1954.

§ 677c. *Transfer of members from full-blood roll to mixed-blood group; time; certification by Secretary*

Any member of the tribe whose name appears on the proposed roll of full-blood members as provided in section 677g of this title and any person whose name is added to such proposed roll as the result of an appeal to the Secretary may apply to the Superintendent to become identified with and a part of the mixed-blood group; *Provided*, That such application is made within thirty days subsequent to the publication of such proposed roll or in the event of an appeal within thirty days subsequent to notification of the decision on said appeal: *And provided further*, That before such transfer is made upon the official rolls the Secretary shall first certify that, in his opinion, such change in status is not detrimental to the best interest of the person seeking such change.

§ 677d. *Restriction of tribe to full-blood members after publication of final rolls; non-interest of mixed-blood members; new membership*

Effective on the date of publication of the final rolls as provided in section 677g of this title the tribe shall thereafter consist exclusively of full-blood members. Mixed-blood members shall have no interest therein except as otherwise provided in sections 677-677aa of this title. New membership in the tribe shall thereafter be controlled and determined by the constitution and bylaws of the tribe and ordinances enacted thereunder.

§ 677e. *Organization of mixed-blood members; constitution and bylaws; representatives; actions in absence of organization*

The mixed-blood members of the tribe, including those residing on and off the reservation, shall have the right to organize for their common welfare, and may adopt an appropriate constitution and bylaws which shall become effective when ratified by a majority vote of the adult mixed-blood members of the tribe at a special election authorized and called by the Secretary under such rules and regulations as he may prescribe. Such constitution may provide for the selection of authorized representatives who shall have power to take any action that is required by sections 677-677aa of this title to be taken by the mixed-blood members as a group: *Provided*, That nothing herein contained shall be construed as requiring said mixed-blood Indians to so organize if such organization is by them deemed unnecessary. In the event no such approved organization is effected, any action taken by the adult mixed-blood members, by majority vote, whether in public meeting or by referendum, but in either event, after such notice as may

be prescribed by the Secretary, shall be binding upon said mixed-blood members of the tribe for the purposes of said sections.

§ 677f. *Employment of legal counsel for mixed-blood members; fees*

The mixed-blood members of the tribe as a group may employ legal counsel to accomplish the legal work required on behalf of said group under the terms of sections 677-677aa of this title, and for any other purpose by them deemed necessary or desirable; the choice of counsel and fixing of fees to be subject to the approval of the Secretary until Federal supervision over all of the members of said group and their property is terminated in the manner provided in section 677o of this title.

§ 677g. *Membership rolls of full-blood and mixed-blood members; preparation and initial publication; appeal from inclusion or omission from rolls; finality of determination; final publication; inheritable interest; future membership*

The tribe shall have a period of thirty days from August 27, 1954 in which to prepare and submit to the Secretary a proposed roll of the full-blood members of the tribe, and a proposed roll of the mixed-blood members of the tribe, living on August 27, 1954. If the tribe fails to submit such proposed rolls within the time specified in section 677-677aa of this title, the Secretary shall prepare such proposed rolls for the tribe. Said proposed rolls shall be published in the Federal Register, and in a newspaper of general circulation in each of the counties of Uintah and Duchesne in the State of Utah. Any person claiming membership rights in the tribe, or an interest in its assets, or a representative of the Secretary on behalf of any such person, within sixty days from the date of publication

in the Federal Register, or in either of the papers of general circulation, as hereinbefore provided, whichever publication date is last, may file an appeal with the Secretary contesting the inclusion or omission of the name of any person on or from either of such proposed rolls. The Secretary shall review such appeals and his decision thereon shall be final and conclusive. After disposition of all such appeals to the Secretary, and after all transfers have been made pursuant to section 677c of this title the roll of the full-blood members of the tribe, and the roll of the mixed-blood members of the tribe, shall be published in the Federal Register, and such rolls shall be final for the purposes of sections 677-677aa of this title, but said sections shall not be construed as granting any inheritable interest in tribal assets to full-blood members of the tribe or as preventing future membership in the tribe, after August 27, 1954, in the manner provided in the constitution and by-laws of the tribe.

§ 677h. *Sale or other disposition of certain described lands; funds; relief of United States from liability; assigned lands*

The business committee of the tribe for and on behalf of the full-blood members of said tribe, and the duly authorized representatives for the mixed-blood members of said tribe, acting jointly, are authorized, subject to the approval of the Secretary, to sell, exchange, dispose of, and convey to any purchaser deemed satisfactory to said committee and representatives, any or all of the lands of said tribe described as follows, to wit: [Real property descriptions omitted]

All such sales, exchanges, or other dispositions shall be made upon such terms as said committee and said authorized representatives shall deem satisfactory and may be made pursuant to bids or at private sale, and all funds or other property derived from such sales, exchanges, or other dispositions shall be

subject to the terms of sections 677-677aa of this title. Consent by the tribal business committee and said authorized representatives to the sale, exchange, or other disposal of the lands herein described shall relieve the United States of any liability resulting from such sale, exchange, or other disposition. The tribal business committee and said authorized representatives are further authorized to sell or dispose of tribal assigned lands to the assignees thereof under such terms and conditions as may be agreed upon by the said tribal business committee and said authorized representatives with the assignees, subject, however, to the approval of the Secretary.

§ 677i. *Division of assets; basis; prior alienation or encumbrance; partition by Secretary upon non-agreement; assistance; management of claims and rights; division of net proceeds; applicability of usual processes of the law to originally owned stock of corporate representative and to corporate distributions*

The tribal business committee representing the full-blood group, and the authorized representatives of the mixed-blood group, within sixty days after the publication of the final membership roll, as provided in section 677g of this title, shall commence a division of the assets of the tribe that are then susceptible to equitable and practicable distribution. Such division shall be by agreement between them subject to the approval of the Secretary. Said division shall be based upon the relative number of persons comprising the final membership roll of each group. After such division the rights or beneficial interests in tribal property of each mixed-blood person whose name appears on the roll shall constitute an undivided interest in and to such property which may be inherited or bequeathed, but shall be subject to alienation or encumbrance before the transfer of title to such tribal property only as pro-

vided in sections 677-677aa of this title. Any contract made in violation of this section shall be null and void. If said groups are unable to agree upon said division within a period of twelve months from the date of such commencement, or any authorized extension of said period granted within the discretion of the Secretary, the Secretary is authorized to partition the assets of the tribe in such manner as in his opinion will be equitable and fair to both groups. Such partition shall give rise to no cause of action against the United States and the costs of such partition shall be paid by the tribe. The Secretary is authorized to provide such reasonable assistance as may be requested by both groups, or by either group, in formulation and execution of a plan for the division of said assets, including necessary technical services of Government employees at Fort Duchesne, Utah, and arranging for necessary consultations with representatives of Federal departments and agencies, officials of the State of Utah, and political subdivisions thereof, and members of the tribe. All unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group, subject to such supervision by the Secretary as is otherwise required by law, and the net proceeds therefrom after deducting the costs chargeable to such management shall first be divided between the full-blood and mixed-blood groups in direct proportion to the number of persons comprising the final membership roll of each group and without regard to the number of persons comprising each group at the time of the division of such proceeds.

The stock of any corporation organized by the mixed-blood group for the purpose of empowering the officers of such corporation to act as the authorized representatives of said mixed-blood group in the joint management with the tribe and in the

distribution and unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to mortgage, pledge, hypothecation, levy, execution, attachment or other similar process, while such stock remains in the ownership of the original stockholder or his heirs or legatees, but the interest of stockholders in any distribution by such corporation shall be subject to the usual processes of the law. [The last paragraph, dealing with stock in corporations, was not part of the law at the time of the acts complained of, but was added by an amendment in 1962]

§ 677j. *Advances or expenditures from tribal funds; restrictions on mixed-blood group until adoption of plan for terminating supervision*

Notwithstanding any other provision of existing law, the tribal funds now on deposit or hereafter deposited in the United States Treasury to the credit of the tribe or either group thereof, shall be available for advance to the tribe or the respective groups, or for expenditure, for such purposes, including per capita payments, as may be designated by the Tribal Business Committee for the full-blood members, and by the authorized agents of the mixed-blood members, and in either event subject to the approval of the Secretary: *Provided*, That the aggregate amount of the expenditures and advances authorized by this section for the mixed-blood group shall not exceed 50 per centum of the total funds of said mixed-blood group after such division, until said mixed-blood group has adopted a plan approved by the Secretary for termination of Federal supervision of said mixed-blood group, as required under section 677*l* of this title. After such termination of Federal supervision, per capita payments to the mixed-blood group shall not be subject to approval of the Secretary.

§ 677k. *Adjustment of debts in making per capita payments to mixed-blood members; execution of mortgages on property*

Fifty per centum of all per capita payments to any individual mixed-blood member made pursuant to any division or distribution under sections 677-677aa of this title shall have deducted therefrom any sum or sums of money owed by such member to the tribe, whether due or to become due, unless in the opinion of the Secretary said debts are not adequately secured in which event the entire per capita payment shall be subject to such offset. Any other division, partition or distribution of property to any individual mixed-blood member made pursuant to sections 677-677aa of this title shall be subject to a mortgage to be made in favor of the tribe securing the payment of all sums of money owed by him to the tribe on the date of such division, partition or distribution to such individual mixed-blood member. The Secretary shall require the execution of any mortgage required under this section as a condition to any such division, partition or distribution.

§ 677*l*. *Distribution to individual members of mixed-blood group; preparation and approval of plan; assistance; provisions permitted in plan*

After the adoption of a plan for the division of the assets between the two groups, a plan for distribution of the assets of the mixed-blood group to the individual members thereof shall be prepared and ratified by a majority of said group, within the period of six months from such adoption and presented to the Secretary for approval. The Secretary is authorized to provide such reasonable assistance, including necessary technical service of Government employees at Fort Duchesne, Utah, and arranging for necessary consultations with representatives of Federal departments and agencies, officials of the

State of Utah and political subdivisions thereof, as may be required by the mixed-blood group in the preparation of such plan.

The plan for division of the assets among the members of the mixed-blood group may include:

(1) Complete disposition of all cash assets of said group, reserving, however, sufficient funds to cover—

(i) The proportionate share of said mixed-blood group in and to all expenses incurred in effecting the purposes of sections 677-677aa of this title, including, but not limited to, the necessary expense incurred under this section and section 677m of this title;

(ii) the just and proportionate share of the mixed-bloods in the expense incurred in the prosecution of the claims of the tribe, or the bands thereof, against the United States; and

(iii) the determinable and estimated administrative costs and expenses of any mixed-blood organization authorized by sections 677-677aa of this title, including lawful and reasonable salaries and fees of authorized agents, officers and employees of said mixed-blood group.

(2) Partition of the lands of the mixed-blood group, excepting all gas, oil, and mineral rights, to corporations, partnerships, or other legal entities, and to trustees, and the individual members of said groups, quality and quantity relatively considered, according to the respective rights and interests of the parties, located so as to embrace, as far as practicable, any improvements lawfully made by the person or persons receiving such land. The value of the improvements made, under a valid

lease or assignment from the tribe, shall be excluded from the valuation in making allotments to the lessee or assignee, and the land must be valued without regard to such improvements unless the lease or assignment, under which said improvements were made, provided that such improvements should become the property of the tribe. In the making of any partition due consideration shall be given to all of the rights and interests of the person or persons receiving the property, and all of the rights and interests of the other members of the tribe. Two or more of the members of said mixed-blood group may obtain their share of property as tenants in common, as joint tenants, or in any other lawful manner when such members agree among themselves as to the manner in which they desire to receive such title. When it appears that an equitable partition cannot be made among the members of said mixed-blood group without prejudice to the rights and interests of some of them, and yet a partition is directed by the group, the members of said group may voluntarily determine compensation to be made by one party to another on acount of the inequity. In all cases where equity is agreed upon by the members of said mixed-blood group, such compensatory adjustment among the parties, according to the principles of equity, must be approved by the Secretary. In the event of a failure to agree upon an equitable compensatory adjustment among the parties the Secretary shall make such adjustment and his decision shall be final.

(3) Organization of corporations for the grazing of livestock, handling of water and water rights, and the shares therein may be issued to the members of said group in proportion to their interests in the assets of such corporations. When, in the opinion of said mixed-blood group, it is to the best interest of said group to transfer a portion of the assets of said group to a corporation or other legal entity for any purpose, the Secretary is authorized to make such transfer.

(4) A transfer of assets to one or more trustees designated by said group who shall hold title to all or any part of the property of said group for management or liquidation purposes under terms and conditions prescribed by said mixed-blood group. The Secretary is authorized to make such transfer, and approve the trustees, and the terms and conditions of the trust.

(5) Sale of any portion of the assets of said group subject to the approval of the Secretary. In addition to the sales herein otherwise authorized, authority is granted to the authorized representatives of said group to sell any property of said group when, in the opinion of the majority of said mixed-blood group, a practicable partition cannot be made, or for any other reason it is deemed to the best interests of the group, and the proceeds of such sales shall be distributed equitably among the members of said mixed-blood group, after deducting reasonable cost of sale and distribution.

§ 677m. *Same; procedure by Secretary if distribution not completed within seven years from August 27, 1954*

In the event all the tribal assets, susceptible to equitable and practicable distribution, distributed to the mixed-blood group under the provisions of section 677i of this title, are not, within seven years from August 27, 1954, distributed to the individual mixed-blood members as contemplated in the plan to be adopted in accordance with the provisions of section 677*l* of this title, so as to effectively terminate Federal supervision over said assets, then the Secretary shall proceed to make such distribution in a manner, in his discretion, deemed fair and equitable to all members of said group, or convey such assets to a trustee for liquidation and distribution of the net proceeds, or convey such assets to the persons entitled thereto as tenants in common.

§ 677n. *Disposal by mixed-blood members of their individual interests in tribal assets; requisites and conditions*

Any member of the mixed-blood group may dispose of his interest in the tribal assets prior to termination of Federal supervision, subject to the approval of the Secretary. In the event a member of the mixed-blood group determines to dispose of his interest in any of said real property at any time within ten years from August 27, 1954, he shall first offer it to the members of the tribe, and no sale of any interest, prior to termination of Federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary. After termination of Federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten-year period, and shall be expressly provided in any patent or deed issued prior to the expiration of said period.

§ 677o. *Termination of restrictions on individually owned property of the mixed-blood group—Transfer of control of trust property; removal of sales restrictions*

(a) When any mixed-blood member of the tribe has received his distributive share of the tribal assets distributed to the mixed-blood group under the provisions of section 677i of this title, whether such distribution is made in part or in whole to a corporation, partnership, or trusteeship in which he is interested, or otherwise, the Secretary is authorized and directed to immediately transfer to him unrestricted control of all other property held in trust for such mixed-blood member by the United States, and shall further remove all restrictions on the sale or encumbrance of trust or restricted property owned by

such member of the tribe, and Federal supervision of such member and his property shall thereby be terminated, except as to his remaining interest in tribal property in the form of any unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other tribal assets not susceptible to equitable and practicable distribution, all of which shall remain subject to the terms of sections 677-677aa of this title, notwithstanding anything contained in said sections to the contrary.

Partition or sale by Secretary prior to removal of restrictions

(b) Prior to the removal of restrictions in acordance with the provisions of subsection (a) of this section on land owned by more than one person, the Secretary may—

(1) upon request of any of the owners, partition the land and issue to each owner an unrestricted patent or deed for his individual share, unless such owner is a full-blood member of the tribe or other Indian who owns trust or restricted property, in which event a trust patent or restricted deed shall be isued and such trust may be terminated or such restrictions may be removed when the Secretary determines that the need therefor no longer exists; (2) upon request of any of the owners and a finding by the Secretary that partition of all or any part of the land is not practicable, cause all or any part of the land to be sold at not less than the appraised value thereof and distribute the proceeds of sale to the owners: *Provided*, That before a sale any one or more of the owners may elect to purchase the other interests in the land, or the tribe may elect to purchase the entire interest in the land, at not less than the appraised value thereof.

§ 677p. *Tax exemption; exceptions and time limits; valuation for income tax on gains or losses*

No distribution of the assets made under the provisions of sections 677-677aa of this title shall be subject to any Federal or State income tax: *Provided*, That so much of any cash distribution made under said sections as consists of a share of any interest earned on funds deposited in the Treasury of the United States shall not by virtue of said sections be exempt from individual income tax in the hands of the recipients for the year in which paid. Property distributed to the mixed-blood group pursuant to the terms of said sections shall be exempt from property taxes for a period of seven years from August 27, 1954, unless the original distributee parts with title thereto, either by deed, descent, succession, foreclosure of mortgage, sheriff's sale or other conveyance: *Provided*, That the mortgaging, hypothecation, granting of a right-of-way, or other similar encumbrance of said property shall not be construed as a conveyance subjecting said property to taxation under the provisions of this section. After seven years from August 27, 1954, all property distributed to the mixed-blood members of the tribe under the provisions of sections 677-677aa of this title, and all income derived therefrom by the individual, corporation, or other legal entity, shall be subject to the same taxes, State and Federal, as in the case of non-Indians; except that any corporation organized by the mixed-blood members for the purpose of aiding in the joint management with the tribe and in the distribution of unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to corporate income taxes. Any valuation for purposes of Federal income tax on gains or losses shall take as the basis of the particular taxpayer the value of the property on the date title is transferred by the United States pursuant to said sections. [Provisions respecting exemp-

tion from corporate income taxes were not part of the original Act, but were added later by amendment.]

§ 677q. *Applicability of decedents' estates laws to individual trust property of mixed-blood members*

The laws of the United States with respect to probate of wills, determination of heirship, and the administration of estates shall apply to the individual trust property of mixed-blood members of the tribe until Federal supervision is terminated. Thereafter, the laws of the several States, Territories, possessions, and the District of Columbia within which such mixed-blood members reside at the time of their death shall apply.

§ 677r. *Indian claims unaffected*

Nothing in sections 677-677aa of this title shall affect any claim heretofore filed against the United States by the tribe, or the individual bands comprising the tribe.

§ 677s. *Valid leases, permits, liens, etc., unaffected*

Nothing in sections 677-677aa of this title shall abrogate any valid lease, permit, license, right-of-way, lien, or other contract heretofore aproved.

§ 677t. *Water rights*

Nothing in sections 677-677aa of this title shall abrogate any water rights of the tribe or its members.

§ 677u. *Protection of minors, persons non compos mentis, and other members needing assistance; guardians*

For the purposes of sections 677-677aa of this title, the Secretary shall protect the rights of members of the tribe who

are minors, non compos mentis, or, in the opinion of the Secretary, in need of assistance in conducting their affairs, by such means as he may deem adequate, but appointment of guardians pursuant to State laws, in any case, shall not be required until Federal supervision has terminated.

§ 677v. *Termination of Federal trust; publication; termination of Federal services; application of Federal and State laws*

Upon removal of Federal restrictions on the property of each individual mixed-blood member of the tribe, the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to such individual is terminated. Thereafter, such individual shall not be entitled to any of the services performed for Indians because of his status as an Indian. All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which supervision has been terminated, and the laws of the several States shall apply to such member in the same manner as they apply to other citizens within their jurisdiction.

§ 677w. *Presentation of development program for full-blood group to eventually terminate Federal supervision; annual progress reports*

Within three months after August 27, 1954, the business committee of the tribe representing the full-blood group thereof shall present to the Secretary a development program calculated to assist in making the tribe and the members thereof self-suporting, without any special Government assistance, with a view of eventually terminating all Federal supervision of the tribe and its members. The tribal business committee, repre-

senting the full-blood group shall, through the Secretary of the Interior, make a full and complete annual progress report to the Congress of its activities, and of the expenditures authorized under sections 677-677aa of this title.

§ 677x. *Citizenship status unaffected*

Nothing in sections 677-677aa of this title, shall affect the status of the members of the tribe as citizens of the United States.

§ 677y. *Execution by Secretary of patents, deeds, etc.*

The Secretary shall have authority to execute such patents, deeds, asignments, releases, certificates, contracts, and other instruments, as may be necessary or appropriate to carry out the provisions of sections 677-677aa of this title, or to establish a marketable and recordable title to any property disposed of pursuant to said sections.

§ 677z. *Rules and regulations; tribal or group referenda*

The Secretary is authorized to issue rules and regulations necessary to effectuate the purposes of sections 677-677aa of this title, and may, in his descretion, provide for tribal or group referenda on matters pertaining to management or disposition of tribal or group assets.

§ 677aa. *Procedure by Secretary upon non-agreement between mixed-blood and full-blood groups*

Whenever any action pursuant to the provisions of sections 677-677aa of this title requires the agreement of the mixed-blood and full-blood groups and such agreement cannot be reached, the Secretary is authorized to proceed in any manner deemed by him to be in the best interests of both groups.

APPENDIX F

REGULATIONS UNDER THE TERMINATION ACT

(25 C.F.R. Part 243)

Section 243.2 *Definitions.* As used in this part:

• • •

(c) "Member of the Tribe" means all mixed-blood and full-blood members as defined in (a) and (b) of this section.

• • •

(f) "Tribe" means the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah.

• • •

(h) "Termination of Federal supervision" means termination of Federal supervision over the particular real estate involved by the issuance of a patent in fee or other similar title document, and does not mean termination of the wardship relationship between the Indian and the United States on the occasion of the issuance of a so-called "Termination Proclamation" (25 U.S.C. 677v).

Section 243.5 *Offer.* Any mixed-blood member of the tribe desiring to dispose of his interest in real property, as herein defined, prior to termination of Federal supervision over such property, must notify the Superintendent of his desire to dispose thereof, and shall state the price and terms upon which the land is offered for sale or which constitute a bona fide offer to purchase.

Section 243.6 *Notice of offer.* The Superintendent shall notify in writing the corporations and the tribal business com-

mittee of the tribe of any offer of sale, and shall post notices of the offer of sale in a conspicuous place in the Uintah and Ouray Agency Office at Fort Duchesne and in the Post Offices of the towns of Roosevelt, Whiterocks, Randelett, Myton, and Fort Duchesne, Utah, for a period of at least ten days. The notices shall specifically describe the terms upon which such sale is to be made and the final date for acceptance of offer from members of the tribe by submission of an appropriate bid.

Section 243.7 *Acceptance of offer.* Upon receipt of an acceptance of the offering from any member of the tribe to purchase such land, the Superintendent shall immediately notify the mixed-blood member making the offer to sell such land and the sale may be completed in accordance with the offer and acceptance. In the event two or more members of the tribe submit an acceptance of the seller's offer, the Superintendent shall call for sealed bids from the parties submitting such acceptances and the sale shall be made to the highest bidder provided the highest bid equals or exceeds the seller's offering price.

Section 243.8 *Certificate of non-acceptance.* If no acceptance is made by a member of the tribe to purchase such land, the Superintendent shall notify the mixed-blood member making such offer that no member of the tribe has accepted the offer to sell and the mixed-blood member may then sell such land at any time within six months thereafter to any person at the same or greater price and upon the same terms and conditions upon which it was offered to the members. The Superintendent shall furnish to such purchaser a certificate, properly acknowledged for recording, certifying that a proper offer at a price and on terms specified in the certificate was made to members of the tribe in accordance with law and the regulations of the Secretary.

Section 243.9 *Re-offer.* If no sale is made, within a six months' period after the seller has been so notified by the Superintendent, then a new offer must be made to the members of the tribe in the manner set forth in section 243.5.

Section 243.10 *Subsequent sale.* If, for any reason, a sale should not be consummated after an acceptance by a member of the tribe, as provided in section 243.7, a new offer to sell shall be made to the members of the tribe in the manner set forth in section 243.5.

Section 243.12 *Sale of stock in the corporations.* In the event any stockholder of the corporation determines to sell or dispose of any stock owned by him in any of the corporations prior to August 27, 1964, he shall first offer it to the members of the tribe in accordance with the provisions set forth in the Articles of Incorporation and in the certificate of stock of such corporation and in the manner provided in §§ 243.5 through 243.10, as far as practicable.

APPENDIX G

PERTINENT PROVISIONS OF THE SECURITIES EXCHANGE ACT OF 1934 (15 U.S.C. §§ 78a, et seq.) AND REGULATIONS ADOPTED THEREUNDER

15 U.S.C. § 78j:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 (17 C.F.R. 240.10b-5):

"It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

"(a) to employ any device, scheme, or artifice to defraud,

"(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

15 U.S.C. § 78cc:

Every contract made in violation of any provision of this title or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of such contract, and (2) as regards the rights of any person who not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation . . .

No. 82-2078

In the Supreme Court of the United States

OCTOBER TERM 1982

RANDOLPH C. HACKFORD, LAWANNA KAY REED THOMPSON, ALLEN D. REYOS AND ORANNA BUMGARNER MOOSMAN, for themselves and for and on behalf of all other persons similarly situated, PETITIONERS,

v.

FIRST SECURITY BANK OF UTAH, N.A., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT FIRST SECURITY BANK OF UTAH, N.A.

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QUESTIONS PRESENTED

1. Is the Respondent Bank, which met its duties under the Trust Agreement with the United States, liable for the now perceived problems flowing from the 1954 enactment of the Termination Act?

2. Did the lower courts err in holding that there was no res judicata or collateral estoppel effect on any material issues in this case from the Court's decision in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), which case involved different stock, different transactions, different instructions to the Bank, and market-making by bank employees?

3. Does the court of appeals' conclusion that assessable stock in a nonprofit grazing corporation was not a "security" within the meaning of the Securities Exchange Act of 1934 conflict with decisions of any other circuit?

4. Is review by this Court appropriate where petitioners do not contest the lower courts' conclusion that the statute of limitations had run on the claims of 422 of the 456 class members and where the timeliness issue of the claims of the remaining 34 class members was reserved?

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In the Supreme Court of the United States

OCTOBER TERM 1982

RANDOLPH C. HACKFORD, LAWANNA KAY REED THOMPSON, ALLEN D. REYOS AND ORANNA BUMGARNER MOOSMAN, for themselves and for and on behalf of all other persons similarly situated, PETITIONERS,

v.

FIRST SECURITY BANK OF UTAH, N.A., RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT FIRST SECURITY BANK OF UTAH, N.A.

STATEMENT OF THE CASE

As demonstrated by the number and scope of the Questions Presented in the Petition, petitioners seek review of the trial court's entire factual and legal adjudication, as affirmed completely by the court of appeals. Because of the multiplicity of issues raised by petitioners, the extensiveness of the evidence, and the incompleteness of petitioners' factual statement, a detailed recitation of the facts of the case is necessary.[1]

[1]The trial judge's Memorandum Opinion (App. C 29-52) extensively sets out the findings of facts relating to events now 20 years old. Those findings were based upon dozens of witnesses and literally hundreds of exhibits. The findings of the trial court are conclusive unless clearly erroneous. *United States v. General Dynamics Corp.*, 415 U.S. 486, 508 (1974).

A. Proceedings Below.

On July 17, 1975, a class of mixed-blood Ute Indians who had been beneficiaries of the Affiliated Ute Indian Trust Agreement commenced an action against the trustee, First Security Bank,[2] for selling stock in the Antelope Sheep Range Company and Rock Creek Cattle Range Company ("Range Companies") held in trust to the Ute Indian Tribe ("Tribe") for an alleged inadequate price in breach of its fiduciary duty and in violation of Rule 10b-5, 17 C.F.R. § 240.10b-5. The action also included a second class of adult mixed-blood Ute Indians who alleged that the Bank aided and abetted the Tribe's fraudulent purchase of their Range Company stock in violation of Rule 10b-5.

The Honorable Bruce S. Jenkins held (i) that the Bank had no duty under the Trust Agreement to consult with the beneficiaries about the stock sale, and that there was no evidence either that it breached such a duty or that the beneficiaries were deceived (App. C 57-69); (ii) that the Range Company stock was not a "security" within the meaning of the Securities Exchange Act of 1934 because there was not an expectation of profit from the efforts of others (App. C 69-81); (iii) that there was no breach of fiduciary duty in the trustee's sale in 1960 of the Range Company stock because the trustee reasonably relied on the 1958 fair market appraisal in determining the sales price and because it followed the government-mandated bidding procedures in offering the stock to all known interested purchasers (App. C 96); (iv) that the claims of 422 of the 456 class members were time-barred (App. C. 96-106); and (v) that petitioners' arguments of res judicata and collateral estoppel were without merit (App. C 81-84, 100-02).

The United States Court of Appeals for the Tenth Circuit affirmed the district court on all grounds in an unpublished opinion (App. A)

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[2]First Security Bank of Utah, N.A. is a wholly-owned subsidiary of First Security Corporation. Affiliated companies are First Security Bank of Idaho, N.A., First Security Bank of Rock Springs, First Security State Bank, Utah Mortgage Loan Corporation, First Security Financial and Ed D. Smith & Sons.

and denied a Petition for Rehearing (App. B). The court of appeals held: (i) that petitioners' res judicata and collateral estoppel arguments failed because the factual issues in the case were critically different (App. A 10-11); (ii) that the Range Corporation stock was not a "security" (App. A 12-17); (iii) that the Bank as transfer agent did not owe a fiduciary duty to the non-beneficiary mixed-bloods who sold their stock to the Tribe (App. A 17-19); (iv) that the Bank did not breach its duties to the beneficiaries under the Trust Agreement (App. A 19-24); and (v) that all other contentions of the petitioners were "without merit" (App. A 24).

B. Statement of Facts.

In 1954 Congress passed the Ute Indian Supervision Termination Act (the "Termination Act"), 25 U.S.C. § 677 *et seq.*, providing for partition and distribution of tribal assets between the mixed-blood and full-blood members of the Ute Indian Tribe and for the termination of federal supervision over the mixed-blood members.[3] The Termination Act provided that the division of all tribal assets was to be agreed upon by the authorized representatives of the 1,314 full-bloods and the 490 mixed-bloods. For that purpose, the mixed-bloods organized themselves as the Affiliated Ute Citizens of Utah (hereinafter "AUCU") under a constitution and bylaws. Exh. P-3A.[4] The AUCU Constitution established a board of directors ("AUCU Board") of five members, with delegated power "to perform all duties and functions of the mixed-blood members as authorized representatives thereof."

In accordance with the Termination Act, the division of assets, including range lands, between the mixed-bloods and full-bloods, was accomplished by joint action of the AUCU Board and the Tribal Business Committee, under the supervision of the Bureau of Indian

[3]Much of petitioners' Brief focuses on the errors and wrongs of termination, and in effect seeks to visit those legislative sins on the head of the Bank. Since the Bank had no role whatsoever in that legislation, petitioners' effort is misplaced.

[4]All exhibit references are to trial exhibits.

Affairs ("BIA"), Exh. P-10, P-11, and with approval by the entire mixed-blood membership, Exh. P-6, P-7, P-8, P-13. The AUCU Board's "Plan for Distribution" provided that all lands received by the mixed-bloods should be valued and "recommendation shall be made as to feasible units for use by the Mixed-Blood members . . ." Exh. P-20. In 1958 the AUCU Board employed Charles F. Moore (formerly the BLM Regional Grazier in Utah) for 70 days of appraisal of these range lands received by the mixed-bloods in the division.[5] Moore's appraisal report, which was reviewed and approved by two BIA supervising appraisers, was "[t]o estimate the fair market value for the surface right for the subject property." Exh. P-25. Some 44,054.52 acres (appraised by Moore at $246,000) went into the Rock Creek Catle Range Company, and 128,408.58 acres (appraised at $246,000) went into the Antelope Sheep Range Company.

In 1958, the Range Companies were organized with title to a large portion of the range land. Exh. P-76, P-77. Each Range Company authorized issuance of 490 shares without par value, one share for each AUCU member. One cattle share entitled the shareholder to graze two and one-half cows for six months each year, and one sheep share entitled the shareholder to graze five sheep per year. The Articles provided that the corporations were nonprofit; that no dividends could be paid; that the stock was assessable without limitation; and that 85% of all income of the companies had to come from shareholder assessments. Exh. P-76, P-77. First Security Bank became transfer agent for the companies sometime after March 1961.

On July 28, 1960, the Secretary of the Interior executed the Affiliated Ute Indian Trust Agreement with defendant First Security Bank as trustee. Exh. P-98. There were 175 mixed-bloods, chiefly minors, designated as beneficiaries. The Trust Agreement directed that:

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[5]Petitioners incorrectly state that this appraisal was made by the BIA for the purpose of the division of lands between the mixed-blood and full-blood groups. The AUCU Board's resolution employing Mr. Moore, Exh. P-24, the Moore appraisal itself, Exh. P-25, and Mr. Moore's deposition testimony at trial all state unequivocally that the appraisal was to establish a fair market value for the range lands.

> The Trustee shall pay to or apply on behalf of each Beneficiary, at convenient intervals, such amounts of income and/or principal of that Beneficiary's portion of the trust fund as the Trustee in its sole discretion may deem advisable for the *maintenance, care, welfare, support and education of such a Beneficiary and for his family for whose care he is legally responsible.*

Exh. P-98 (emphasis added).

Prior to the 1960 adoption of federal regulations governing sales of Range Company shares, a large number of adult mixed-bloods negotiated sales of Range Company stock among themselves, referred to as "private treaty" sales, at an average price per *unit* (one share in each company) of $282.16.[6] Exh. P-101. Early in 1960, the AUCU Board began discussing the sale of Range Company stock to the Tribe. *E.g.*, Exh. P-75 (March 8, 1960). By March 31, 1960 the AUCU Board and the Tribal Business Committee had "thoroughly discussed" the possibility "of the full-blood members [purchasing] the stock of both corporations for the appraised value thereof." Exh. P-328. In response to an AUCU Board ballot to all mixed-bloods on selling the stock to the Tribe "at a price not less than the appraised value," there were 153 votes to sell and only few votes not to sell. Exh. P-75 (August 8, 1960).

On September 13, 1960, representatives of the Tribe met with the Bank's Trust Investment Committee and presented the Tribe's proposal to purchase the Range Company stock held in trust at $1,100 per unit, ten percent above the appraised value. Exh. P-158. The Bank determined to consider the interests of each beneficiary separately, and contacted the minors and guardians to ascertain their wishes with regard to retaining or selling the stock. Exh. 159. On

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[6]Petitioners contend that the Bank participated in the legal wrong of eliminating the private treaty sales. Petition, pp. 22-24. However, the mixed-bloods themselves sought to rescind the private treaty sales because they were at one-fourth the price offered by the Tribe. Exh. P-114; Testimony of Preston Allen, R. XI, p. 444-45; Exh. P-121. All private treaty sales prior to the adoption of the regulations were declared invalid by the BIA commissioner. Exh. P-108A.

September 22, 1960 the Bank authorized the sale of 147 of the trust's 175 units at a price of $1,100 per unit pursuant to the BIA regulation's offer and bidding procedure.[7] Exh. P-165. In its decision, the Bank considered as factors the absence of any potential dividends and the assessability of the stock, that many beneficiaries did not have funds available to meet their needs unless the shares were sold, that a number of the beneficiaries did not live near the range lands, and that the price of $1,100 per unit was a fair price, being 10% above the 1958 fair market appraisal.[8]

On September 23, 1960, the Trustee's offer to sell 147 of the 175 Range Company Units held in trust was transmitted to the superintendent to be offered pursuant to regulation *to all mixed-blood and full-blood members of the Tribe*, acting individually or as groups, *which included every known prior purchaser or interested purchaser of Range Company stock*.[9] In the initial offering, 272 shares (55% of the stock) were offered under the BIA procedure. Those 272 offers were accepted by only two parties, the Tribe and Margaret Sprouse. *See* Exh. P-173, P-174, P-176. The superintendent notified both

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[7]The regulations governing sales of Range Company stock required that a mixed-blood first offer to sell the Range Company stock to all members of the Tribe, both mixed-bloods and full-bloods, through a notice procedure, after which if there was no acceptance, the stock could be offered to nonmembers of the Tribe for the same price. 25 C.F.R. §§ 243.1 through 43.12. The regulations provided for a sealed bidding procedure where there were two or more acceptances.

[8]Petitioners suggest that the Bank did not have access to the Moore appraisal when it made its decision. *See* Petition, p. 3 n.7. However, the supervising trust officer clearly meant the Moore appraisal in his reference to "the value which the lands were appraised. . . ." Exh. 163. In addition, the assistant trust officer who petitioners claim never saw the appraisal (Petition, p. 5 n.11) testified, "I am sure I saw the appraisals. . . ." Transcript, p. 735.

[9]Included in the group to whom the offer was made were *all those individuals whom petitioners list as potential purchasers* and who they claim were "not allowed to" pay a higher price for the stock, *e.g.*, Joseph Arthur Workman, Calvin Hackford, Preston Allen, Margaret Sprouse. *See* Petition, p. 3 n.6. For this reason the trial court found an "absence of evidence of other serious prospective purchasers." (App. C 96).

parties that sealed bids would be accepted, and would be opened on November 3, 1960.[10] Subsequently, the Interior Department found that Margaret Sprouse, a mixed-blood, was acting in behalf of a non-Indian interest and therefore disqualified her, directing that the superintendent was to proceed with the sale to the Tribe "*whose bid is not less than the market value heretofore established for the stock.*" Exh. P-206 (emphasis added). The Tribe thereafter purchased 456 of the 490 issued Range Company units at a price of $1,100 per unit.

Petitioners also argue that "the court below ignored uncontroverted expert evidence . . . on the value of the land."[11] Petition, p. 4. However, plaintiffs offered no expert testimony on the sole valuation issue at trial: the value of the Range Company *stock* in September of 1960. The only expert testimony on the value of the *stock* was that its value in September of 1960 was $650 per unit. Transcript, p. 1484. A separate expert testified that the stock's value in terms of the grazing rights conferred was between $550 and $600 per unit in 1960-61. Transcript, pp. 1285-86. At trial three experts in trust administration gave uncontradicted testimony that First Security Bank had "acted in a prudent way in arriving at their decision to sell these shares, and they did, in fact, receive a fair price." *See, e.g.*, Transcript, p. 1523.

In 1969 these same class members sued the United States in the

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[10]Mrs. Sprouse filed an action in the United States District Court for Utah seeking a declaratory judgment that the Termination Act did not authorize the sale of the Range Company shares to full-bloods, either individually or collectively. Exh. P-193. The Tribe was held to be a qualified bidder under the Termination Act and allowed to proceed as a bidder for the Range Company stock. Exh. P-193A.

[11]Petitioners apparently base this contention on the testimony of their expert land appraiser, Richard Palmer. Petition, p. 4 n.10. This contention confuses the difference between the value of the *stock* and the value of the corporation's assets. Courts have consistently held that asset value is only one of a number of factors to be considered in valuing closely-held stock, and that the value of the stock is not equal to the value of the assets. *E.g., Louis v. United States*, 66-1 U.S.T.C. ¶ 12390 (N.D. Ill. 1965), *aff'd*, 369 F.2d 263 (7th Cir. 1966); *South Carolina National Bank v. McLeod*, 256 F. Supp. 913 (D.S.C. 1966).

Court of Claims alleging, among other things, that the sale of their Range Company stock had been at an inadequate price to their injury. *Affiliated Ute Citizens v. United States*, No. 156-69 (Ct. Cl.) Those claims were dismissed in their entirety by the Court of Claims (App. C 98-99 n.21,22).

REASONS FOR DENIAL OF THE WRIT

I. THE UNCONTESTED STATUTE OF LIMITATIONS HOLDINGS BELOW, WHICH PRECLUDE THE CLAIMS OF NEARLY ALL CLASS MEMBERS, MAKE REVIEW BY THIS COURT INAPPROPRIATE.

The trial court held that the claims of 422 of the 456 class members, including all the named plaintiffs, were barred by the applicable statutes of limitations (App. C 96-106). This conclusion followed from the fact that all the class members, by their attorney in this action, had filed the Court of Claims action in 1969 (more than six years prior to the commencement of this action) alleging injury from the sale of the Range Company stock at an inadequate price. The court of appeals implicitly affirmed that holding (App. A 24). The Petition is ineffectual because it does not contest that holding and thus does not provide a basis for reversing the lower court's dismissal of the claims of 422 of the 456 class members on grounds of untimeliness.[12]

II. THE LOWER COURTS APPLIED SETTLED PRINCIPLES OF LAW IN THEIR ADJUDICATION OF THE RES JUDICATA AND COLLATERAL ESTOPPEL ISSUES.

A. *In Arguing That the Appellate Court Refused to "Fol-*

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[12]The trial court left unresolved the issue of whether the claims of 34 of the minor beneficiaries were time-barred (App. C 106). The claims of those 34 beneficiaries would be the sole remaining portion of this case on remand. Moreover, in the event of such remand, the trial court would then be required to determine the reserved issue of whether the claims of those 34 remaining class members are also time barred.

low" the Mandate of This Court. Plaintiffs Mischaracterize The Appellate Court's Decision.

Petitioners state that the court of appeals declared "that it would not 'follow the Supreme Court's decision in *Affiliated Ute Citizens v. United States*,' " and characterize the court of appeals as "openly defiant" to this Court and as engaged in a "calculated effort to evade the mandate" of this Court. Petition, p. 8. However, petitioners patently misread that opinion since the court of appeals did not refuse to follow this Court's decision; rather, it specifically found unpersuasive "plaintiffs' claim that we are bound by collateral estoppel and res judicata" by applying the principle that "[b]oth doctrines require an identity of factual issues in the two cases" and concluding that "[h]ere, the facts underlying the plaintiffs' claims are different" (App. A 11). The court of appeals simply rejected petitioners' attempt to force their deficient claims in this case into the critically different factual framework of *Affiliated Ute*. Petitioners cannot show a departure from or disregard of this Court's pronouncements to justify the review they seek.

B. *The Lower Courts Correctly Found the Doctrines of Res Judicata and Collateral Estoppel Inapplicable To This Case.*

Petitioners argue that the doctrines of res judicata and collateral estoppel, by virtue of this Court's opinion in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), precluded the litigation of certain issues in this case. The trial court rejected those arguments, concluding that (i) this Court "adjudicated nothing relative to the Range Company shares" (App. C 82); (ii) the Range Companies involved in this case were distinctly different in character from the Ute Distribution Corporation (App. C 82-83); (iii) the *Affiliated Ute* case, "unlike this case, involves a claim that the Bank . . . engaged in market-making activities" (App. C. 100-01); and (iv) there was a "lack of identity of issues" (App. C 82). The court of appeals similarly rejected petitioners' arguments of res judicata and collateral estoppel on the basic ground that there was not an identity of factual issues (App. A 11). The conclusions of both lower courts are com-

pletely in accord with settled principles of law enunciated by this Court.

Petitioners essentially argue that "[t]he declaration of the Court of Appeals that '[b]oth doctrines [of collateral estoppel and res judicata] require an identity of factual issues in the two cases' is plain error." Petition, p. 11. Petitioners assert that the plain error was the court of appeals' failure to apply the doctrines to "*issues*, between the parties or their privies, and not merely to *facts*." Petition, p. 11. Because of this alleged error, petitioners argue that the lower courts failed to treat as resolved by *Affiliated Ute* "[t]he *issues* of 'trust' and 'duty' [and] the *issue* of whether the BIA appraisal was a fair market value." Petition, pp. 11-12. However, petitioners plainly misread the appellate court's test of whether there was "an identity of factual *issues*," which was consistent with directions from this Court:

> The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.

Allen v. McCurry, 449 U.S. 90, 94 (1980) (citations omitted). Thus, in order for the doctrines of res judicata or collatral estoppel to have applied, there must be an identity of issues of fact or law in both cases. There is no such factual or legal concurrence here on the issues suggested by petitioners.

On the issue of a "trust" relationship with the adult mixed blood sellers, petitioners state that in *Affiliated Ute* "[t]his Court affirmed the trial court's finding of a fiduciary relationship on the same facts involved herein . . ." Petition, pp. 8-9. But petitioners' conclusory assertion that the two cases involve "the same facts" is not correct.

In *Affiliated Ute* this Court held that the two bank employees "were obligated to act on behalf of the mixed-blood sellers" because they "were active in encouraging a market for the UDC stock among non-Indians . . . by soliciting and accepting standing orders from non-Indians," because the Bank received increased deposits and the two employees received gratuities therefor, and because the mixed-blood sellers "relied upon [the defendants] when they desired to sell their shares." *Affiliated Ute*, *supra* at 154. This Court held the Bank secondarily liable because of the acts of its employees. *Id.* at 154. This Court noted that "if the two men and the bank had functioned merely as a transfer agent, there would have been no duty of disclosure here." *Id.* at 152.

In this case, as to the adults, the Bank indeed functioned merely as a transfer agent. The Bank did not make a market in the Range Company shares "nor did the Bank undertake to advise the adults as to the sales of their shares or the price thereof . . ." (App. C 108). Moreover, "it was the mixed-bloods themselves who decided to sell and made the offers of sale" (App. C 108).[13] Thus, the factual issue in *Affiliated Ute* of whether the Bank's employees violated some kind of a fiduciary duty to the mixed-blood sellers of *UDC stock* was simply not an issue, legally or factually, in this case. Rather, since the Bank functioned merely as a transfer agent for the Range Companies, *Affiliated Ute* stands as controlling precedent for the result reached by the lower courts that the Bank had no such fiduciary duty to the mixed-bloods who were not trust beneficiaries.

Petitioners also contend that "[j]ust as clearly litigated was the *issue* of whether the BIA appraisal was evidence of fair market

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[13]In addition, the Bank was expressly instructed to discourage sales of UDC stock by mixed-bloods, *Affiliated Ute*, *supra* at 145-46, and the Bank retained possession of the UDC stock certificates, which bore a specific legend warning against sale or encumbrance, *id.* at 138 n.8. No such instructions were ever given as to the Range Company stock nor did those certificates bear such a legend or warning. On the contrary, it was contemplated that mixed-bloods who did not have a use for the grazing rights bestowed by the stock would sell or lease their shares.

value," Petition, p. 12, relying on the finding of the trial judge in *Affiliated Ute* that "the appraisals were not made for the purpose of fixing the value of the stock at the time of its sale to the Tribe." Petition, p. 4 n.9. However, the trial judge in *Affiliated Ute* did not determine that the Moore appraisal was not a fair market value appraisal (as petitioners contend), but only that its purpose was not to price the stock for sale in 1960. In this case the trial court found that the Moore appraisal was a fair market value appraisal when made, and that the Bank did not act imprudently in utilizing that appraisal two years later in arriving at a sales price that took into account a ten percent appreciation in the land values established by that appraisal (App. A 20-21; App. C 87-88). The trial judge in *Affiliated Ute* did not decide the issues in this case of whether the Moore appraisal was a fair market value appraisal when made and whether the trustee Bank properly relied on that appraisal two years later in ascertaining the price at which to submit the Range Company stock for bid.

Nowhere in this Court's findings in *Affiliated Ute* is the sale of the Range Company stock, either by the Bank as trustee, or by the adults, mentioned or addressed as a part of any claim or finding. The sales of the Range Company stock held in trust, the fair market value of that stock, and the Bank's conduct with regard to the sale by the adults of their Range Company stock were simply not "issues" in *Affiliated Ute*. Indeed, the difference is apparent in this Court summary of the claims in *Affiliated Ute* as involving "misstatements of material fact used by bank employees in position of market maker to acquire [UDC] stock at less than fair value." *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 475 n.15 (1977). Thus, petitioners' arguments of res judicata or collateral estoppel are without merit and their adjudication below does not invite review by this Court.

III. THE CONCLUSION THAT STOCK IN A NONPROFIT GRAZING COMPANY WAS NOT A "SECURITY" DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT

As a second reason for this Court's review, petitioners argue that

the court of appeals erroneously gave supremacy to state corporation law over federal securities law in concluding that the Range Company stock was not a "security," and further contend that such a holding is in conflict with the decisions of four other circuits. However, petitioners misstate the reasoning and holding of the court of appeals, which properly evaluated the Range Company stock in terms of the well-settled criteria set out in *SEC v. W. J. Howey Company*, 328 U.S. 293 (1946), and reaffirmed in *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975) (App. A 12-14). The asserted "conflict" among the circuits is therefore illusory.

A. *The Court of Appeals Did Not Premise Its Decision That the Range Companies Stock Was Not A "Security" On State Corporation Law.*

As the predicate for the asserted conflict among the circuits, petitioners argue that the court of appeals "allow[ed] provisions of state law to control the effect of the federal securities laws. . . ." Petition, p. 14. In support of that assertion, petitioners contend that "the sole justification offered by the court below for the conclusion that the capital stock given to Petitioners . . . was not a 'security,' was the claim that provisions of state corporation law prohibited 'enhancement of stock value.' " Petition, p. 14. However, for that contention petitioners seize upon one sentence (referring to the Utah Nonprofit Corporation and Cooperative Association Act) in the course of several pages of analysis on the element of an expectation of profit from corporate activity. Rather than turning its conclusion on state corporate law, the court of appeals analyzed the Range Company stock in terms of "whether the scheme involves an investment of money in a common enterprise with profits to come from the efforts of others." (App. A 12 quoting from *Howey, supra*). The court concluded that the stock "does not meet two elements of the *Howey* test: an expectation of profits and that the profits arise 'solely from the efforts of the promoters or a third party.' " (App. A 13). On the issue of expectation of profit, the court considered that the "corporations were to be nonprofit and to have at least 85 percent of

their income derived from assessments collected from shareholders'' (App. A 13), and that ''[t]he corporations were created to facilitate the use of range land by the shareholders, not as potential investments.'' (App. A 15). The court then observed that ''had the corporations been designed to profit the shareholders . . . they could not have been organized under the Utah Nonprofit Corporation . . . Act.'' (App. A 15). Thus, the court of appeals' reference to the state Nonprofit Corporation Act was merely one of a number of points leading to its conclusion that there was not an expectation of profit in the Range Companies. Since that decision was in accordance with well-settled principles of federal law and not in conflict with other circuits, review by this Court is not warranted.

— B. *The Lower Courts Correctly Concluded That the Range Companies Stock Was Not A ''Security'' Within the Meaning of the Securities Exchange Act of 1934.*

Both lower courts dismissed petitioners' Rule 10b-5 claims in part on the ground that the stock in the Range Companies was not a ''security'' within the meaning of the Securities Exchange Act of 1934. Each Range Company was ''a *nonprofit* grazing corporation'' and

> [a]ll income of the corporation, whether from stock assessments or otherwise shall be retained and used to pay the necessary and incidental expenses of this corporation and at least 85 percent of such income shall be derived from assessments collected from the stockholders and shall be used for the sole purpose of meeting such expenses or losses that may be incurred by the corporation.

Exh. P-76, P-77. The stock entitled each stockholder to limited cattle and sheep grazing privileges for his own livestock upon the corporation range. This aspect of stock ownership represented the only potential for profit for the stockholders, since they could graze their own livestock or assign or lease their grazing rights. Such grazing or leasing was not a corporate activity, and any profit therefrom would

be generated solely by the individual shareholder's efforts.

The Securities Exchange Act of 1934 states that, unless the context otherwise requires, "the term 'security' means any . . . stock." 15 U.S.C. § 78c(a) (10). In 1975, this Court construed this statutory language to mean that stock is a security only if it has the attributes of a security:

> We reject at the outset any suggestion that the present transaction, evidenced by the sale of shares called "stock," must be considered a security transaction simply because the statutory definition of a security includes the words "any . . . stock." Rather we adhere to the basic principle that has guided all of the Court's decisions in this area:
>
> "[I]n searching for the meaning and scope of the word 'security' in the Act[s], form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin v. Knight*, 389 U.S. 332, 336, 19 L. Ed. 2d 564, 88 S Ct 548 (1967).

Forman, supra at 848 (footnotes omitted).

The *Forman* decision reaffirmed the definition of "investment contract" set forth in *Howey*:

> We perceive no distinction, for present purposes, between an "investment contract" and an "instrument commonly known as a security." In either case, the basic test for distinguishing the transaction from other commercial dealings is "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *Howey*, 328 U.S., at 301, 90 L.Ed. 1244, 66 S. Ct. 1100, 163 ALR 1043. This test, in shorthand form, embodies the essential attributes that run through all of the Court's decisions defining a security. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.

Id. at 852 (footnote omitted). While all of these attributes are absent in the Range Company stock, the most critical deficiencies are the absence of an expectation of profits from the efforts of others.

A securities transaction, by its very definition, is one in which capital is sought for profit-making purposes. In these corporations, there was no possibility or expectation of "dividends contingent upon the apportionment of profits," which this Court has deemed the most common and salient feature of "securities." *Forman, supra* at 851. This Court wrote in *Forman*: "The focus of the Acts is on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes." *Id.* at 849. No reported case of which respondent is aware has ever held that stock in a nonprofit corporation, such as the Range Companies, is a "security" within the meaning of the Securities Exchange Act. *See, e.g., B. Rosenberg & Sons, Inc. v. St. James Sugar Cooperative, Inc.*, 447 F. Supp. 1, 3-4 (E.D. La. 1976), *aff'd*, 565 F.2d 1213 (5th Cir. 1977). Thus, absent some exceptional circumstance not present here, stock in a nonprofit corporation such as the Range Companies is not a "security" within the meaning of the 1934 Act.

The kinds of profits commonly associated with securities are explained and limited by the *Forman* opinion:

> By profits, the Court has meant either capital appreciation resulting from the development of the initial investment . . . or a participation in earnings resulting from the use of the investors' funds. . . . By contrast, when a purchaser is motivated by a desire to use or consume the item purchased — 'to occupy the land or to develop it themselves,' as the Howey Court put it, *ibid.* — the securities laws do not apply.

Forman, supra at 852-53 (footnote omitted). In the Range Companies, any revenues derived from grazing would not be profit or dividends from the stock but merely earnings from the labors of the stockholder using the stock grazing rights himself. Moreover, normal appreciation in the value of real estate is not an investment return, and

no security is involved in such appreciated interests. *Grenader v. Spitz*, 537 F.2d 612, 618 (2nd Cir.) *cert. denied*, 429 U.S. 1009 (1976); *Johnson v. Nationwide Industries, Inc.*, 450 F. Supp. 948, 951-54 (N.D. Ill. 1978); I L. Loss, Securities Regulation 491-92 (2d ed. 1961).

In addition, under the test of a "security," any benefit, income, or profit to be derived by the shareholders must come from the efforts of others. However, the Range Companies were organized to maintain the range land so that the shareholders themselves could graze their sheep or cattle, or assign or lease their grazing rights to another. The purpose of the corporations was simply to make the land available so that the shareholders could use it themselves for grazing. Since the shareholders in the Range Companies bore the real burden of managing their own grazing rights, the element of the efforts of others is missing.

Finally, petitioners suggest that the lower court decisions exempt "an important segment of industry from needful regulation mandated by Congress in 1932-34." Petition, p. 19. It is difficult to conceive of nonprofit grazing corporations as an "important segment of industry" and even more difficult to perceive any need for regulation of the market in such shares.

IV. THE DECISIONS IN THE LOWER COURTS DO NOT INVOLVE OR THREATEN THE GOVERNMENT'S TRUST OBLIGATIONS TO THE INDIANS

As the final ground for review, petitioners conjure up a threat to "the rights of all dependent Native populations" from the "lower court's handling of the inter-related trust/Indian law issues . . ." Petition, p. 20. This far-reaching threat is seen by petitioners in the disposition of the issues of whether the Bank breached the Affiliated Ute Indian Trust Agreement and whether the standard of review for the alleged breach of trust claim was erroneous. However, the lower courts simply adjudicated, on well-settled principles of law, the two breach of trust claims alleged by petitioners.

A. *The Advisability of Termination or of the Bureau of Indian Affairs' Implementation Thereof Was Not At Issue In This Case.*

Petitioners' real complaint is against either the United States Congress for passing the Termination Act or against the Bureau of Indian Affairs for incorrectly implementing termination.[14] Indeed, the sweeping language of the Petition is addressed primarily, if not exclusively, to that issue. Nearly all of the matters of which petitioners complain are consequences of termination rather than actions of the Bank. For instance, petitioners complain that "the Bank implemented the sale of petitioners' only remaining land for no consideration other than the monetary one. . . ." Petition, p. 20. However, the Trust Agreement prepared by the Bureau of Indian Affairs required the Bank first to take into account and fund the maintenance, care, welfare, support and education needs of the beneficiaries.[15] The terms of the Trust Agreement were the definition of the Bank's duties, and the Bank bears no legal liability for the Termination Act or its consequences.

Finally, contrary to petitioners' contention, the decisions below pose no conflict to the decisions of the Court of Claims on termination. In *Yanktown Sioux Tribe v. United States*, 623 F.2d 159, 161 (Ct. Cl. 1980), cited by petitioners, the claims did not involve termination policy, but rather dealt with a tribe's claims *against the United States* for "improper handling of both land and trust funds." The Court of Claims' discussion of termination policy in *Klamath and Modoc Tribes v. United States*, 436 F.2d 1008, 1010-13, 1020-

[14]Petitioners did file claims against the United States in the Court of Claims in 1969 for certain alleged injuries in the termination process, including a claim that their Range Companies stock was sold at an inadequate price. *Affiliated Ute Citizens v. United States*, No. 156-69 (Ct. Cl.). Those claims were dismissed in their entirety.

[15]At the inception of the trust, 102 of the 175 trust beneficiaries had no assets other than the Range Companies stock deposited into their trust accounts. Exh. P-98(A). Thus, the Bank's obligation to provide "maintenance, care, welfare, support and education" mandated the sale of the Range Company stock of most of the trust beneficiaries.

21 (Ct. Cl.) *cert. denied*, 404 U.S. 950 (1971), recognized that Congress intended the federal government cease its trustee management over the property of terminated Indians but that it do so without diminishing the rightful compensation to those Indians and without harming them or the nonterminating Indians. Neither case challenges the trial court's conception of termination as removing governmental control over the mixed-bloods nor suggests that some duty is imposed on the Bank other than by the Trust Agreement. There is in this case no reviewable issue of whether termination was an advisable policy or what effect termination had on the federal government's duty to terminating Indians.

B. *The Government's Elimination of "Private Treaty" Rights, At the Behest of the Mixed-Bloods, Did Not Constitute A Breach of the Bank's Duty Under the Agreement.*

Petitioners complain that the elimination of the "private treaty" right constituted a breach of trust by the Bank. *See* Petition, pp. 21-26. However, it was the Bureau of Indian Affairs, at the express behest of the AUCU Board, which declared void any private treaty sales prior to the adoption of the regulations (App. C 64).[16] There was no evidence at trial that the Bank ever encouraged such a result.

C. *The Lower Courts Applied A Correct Standard of Review To Petitioners' Breach of Trust Claims.*

Petitioners finally urge that the lower courts erred by applying a good faith or reasonableness test to their breach of trust claims. Petition, p. 26. The Court of Appeals and trial court concluded that

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[16]The regulations expressly protected the rights of both mixed blood and full blood members to purchase Range Company shares so long as they paid to the selling member the price desired. Moreover, these regulations simply codified the intent of the Termination Act. The private treaty transactions before the adoption of the regulations, which were at one-fourth the purchase price paid by the Tribe, did nothing to promote the welfare of the mixed-bloods other than those who aggressively sought to purchase stock for inadequate prices.

the Bank "was under a duty to the beneficiaries to exercise the care and skill in dealing with the trust property required by the trust instrument and Utah law."[17] (App. C 19). Moreover, the only breaches of trust which petitioners allege are that the Bank "fail[ed] to entertain the competing offers," Petition, p. 25, and that the Bank sold the stock for an inadequate price, Petition, p. 29. However, the trial court as trier of fact found that the sale price was reasonable and adequate (App. C 87-96), and found that there was an "absence of evidence of other serious purchasers . . ." (App. C 96).

The proper standard of review flowed from petitioners' specific claims that the Bank breached the Affiliated Ute Indian Trust Agreement and that it violated UTAH CODE ANNO. § 33-2-1 (1963). Section 33-2-1 is a codification of the prudent man standard presently accepted by a majority of the states and in Utah. *Dipo v. Dipo*, 526 P.2d 923 (Utah 1974); RESTATEMENT (SECOND) OF TRUSTS § 174 (1959); BOGERT, TRUSTS AND TRUSTEES, § 541 at 157-160 (2d ed. 1978). The question of whether a trustee has acted "prudently" is entirely a factual issue to be judged under the circumstances existing at the time of the trustee's decision. *E.g., In re Parks Trust*, 38 Wash. 2d 763, 238 P.2d 1205, 1208-09 (Wash. 1951). Such a standard has been applied in the federal courts. *E.g., Withers v. Teachers' Retirement System of New York*, 447 F. Supp. 1248 (S.D.N.Y. 1978), *aff'd*, 595 F.2d 1210 (2nd Cir. 1979). Moreover, there is nothing in the language of the Trust Agreement itself nor in the fact that the beneficiaries were Indians that imposed a higher duty on the Bank.[18]

The trial court found the Bank's actions in selling the 147 Range Company Units were clearly prudent. The asset sold was not a

[17]Petitioners argued to the court of appeals that the Bank failed to meet this prudent man standard, but did not contend that the trial court applied an incorrect standard of review.

[18]Petitioners suggest, without supporting reference, that the lower courts applied a good faith test. Petition, pp. 26-27. However, it is clear that those courts rather applied a prudent man test (App. A 19; App. C 84-96). Petitioners' discussion of the "good faith" standard in cases where the United States was trustee for Indians is therefore inapposite.

productive trust asset, the Bank followed appropriate trust procedures in the sale, and the sale was at the fair market price for the Range Company stock. The evidence at trial showed that the Bank was charged with a duty of care, support, maintenance and education for the beneficiaries. Exh. P-98A, R. XII. In reviewing these actions, three experts in trust administration testified that the Bank had acted prudently and properly. *See, e.g.*, Transcript p. 1523. Under these circumstances, the trial court's conclusion that the sale of the stock was prudent is clearly supported by the facts and consonant with prevailing case law. *E.g., Braman v. Central Hanover Bank and Trust Company*, 138 N.J. Eq. 165, 47 A.2d 10 (1946).

For these reasons, the lower court's review of the breach of trust claims utilizing the common law and statutory prudent man rule neither threatens Indian rights nor undermines Congressional purposes, and the decision does not merit review on that basis.

CONCLUSION

There is no issue in this case that falls within the criteria of Rule 17.1 as being appropriate for this Court's review. Moreover, the unchallenged statute of limitations holding below renders any review by this Court of the Questions Presented essentially meaningless. For these reasons, the Petition should be denied.

Respectfully submitted,

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JAMES S. JARDINE

AUGUST 1983

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

RANDOLPH C. HACKFORD, LAWANNA KAY, REED THOMPSON, ALLEN D. REYOS AND ORANNA BUMGARNER MOOSMAN, FOR THEMSELVES AND FOR AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,
PETITIONERS,

V.

FIRST SECURITY BANK OF UTAH, N.A.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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AUGUST 21, 1983

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Petitioners Randolph C. Hackford, et al., reply to arguments first raised in the Brief for Respondent First Security Bank of Utah, N.A.,* and discuss herein important new decisions of this Court rendered at the conclusion of the 1982 term which are dispositive against the arguments advanced by Respondent.

OPINION BELOW

The opinion of the Court of Appeals is now reported at CCH Fed. Sec. L. Rep. ¶99,402 (10th Cir., Jan. 31, 1983).

REASONS FOR GRANTING THE WRIT

I

THE BANK'S RESPONSE IS INAPPROPRIATE

The suggested "Questions Presented" at the first page of Br. and the largest part of the discussion which follows, diverts attention to matters not material to the opinion of the Court of Appeals and is an inappropriate response to a Petition of Certiorari. [See Rules 17 and 21.1(g) of this Court.] In consequence, this Court is deprived of meaningful discussion of the critical issues posed by this Petition, which is the proper function of the certiorari process.

The Bank's response, furthermore, argues mere *theories*, never adopted by the court below, including the following:

1. The arguments at Br. 8-12, that the *acts* of the Bank in selling the shares of the range corporations were not previously adjudicated, fail to address the *issues* on which *Affiliated Ute* is conclusive. The opinion below was clearly

*The Brief for Respondent is referred to herein as "Br." Otherwise, all abbreviations, including case citations, follow the style of the Petition.

based upon the three *purely legal conclusions* set out at pages 1 and 30 of the Petition of (1) no Rule 10b-5 duty, (2) no fiduciary relationship and (3) that *Affiliated Ute* would not be "follow[ed]." Particular acts in selling the shares are irrelevant to those issues.

2. Neither the Court of Appeals nor the trial Court adopted, or even made reference to, the Bank's theory that the range shares should be valued as "stock." (Br. 7) Counsel for Respondent candidly explained at trial that *no evidence was being offered* on the question of value of the range land, even though the trial judge ruled that the breach of trust question would be determined by whether Petitioners were paid a fair value *for the land* (App. C, 84, 86):

> MR. QUINN: We're not attempting by this witness [Darwin Nielson], Your Honor, to introduce any testimony *with respect to the underlying value of the real estate*. We're here dealing with the value of the grazing rights. (Tr. 1285.) (Emphasis added.)

Arguments to the contrary at Br. 7 mislead by obscuring the fatal evidentiary flaw in the opinion below, in which the *only* evidence of value of 172,000 acres of land is the expert testimony of Plaintiffs' appraiser. That evidence, moreover, was stipulated as to qualifications and corroborated by the opinions of the Indian owners. The Bank's "experts" on the value of "stock" are simply not material to the issue that was decided below. See App. A, 20-21, App. C, 88, 96.

3. The Court of Appeals did not address, in any way, the statute of limitations question raised at Br. 8. That argument is clearly diversionary, for the Bank concedes that under any circumstances many of Petitioners could not be time-barred.

4. Neither does the opinion below contain any distinction between the "facilitat[ing]" of mixed-blood sales, found by this Court to be fraudulent at 406 U.S. 128, 153, and the direct sales activity herein, as urged at Br. 11-12. The Court of Appeals did not, in fact, even discuss in any meaningful way the sales activity involved in this case. Were there such a distinction, it would be of no comfort to the Bank, for direct sales by a fiduciary is involvement of a higher order than merely facilitating the sales of others.

II

SUMMARY REVERSAL SHOULD BE GRANTED UNDER THIS COURT'S RECENT DECISIONS

Despite the urging of Respondent at Br. 3 that there was no fiduciary duty to Indians who were not named beneficiaries and at Br. 19-21 that the "good faith" and "reasonableness" standards applied in the courts below are not questions of significance, this Court's decision in *United States* v. *Mitchell*, ... *U.S.* ....., 51 U.S.L.W. 4999 (U.S., June 27, 1983), announced subsequent to the filing of the Petition, indicates the importance of those questions and that reversal is appropriate.

1. Justice Marshall's opinion for the Court in *Mitchell* contains the following holding pertinent to the Bank's argument that there was no fiduciary relationship:

> Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). "[*W*]*here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies*

> *or properties . . . even though nothing is said expressly . . . about a trust fund, or a trust or fiduciary connection.*" 51 U.S.L.W. 5004-05 (citations omitted, emphasis added)

The Court of Appeals denied the existence of a fiduciary duty herein, even though the Bank was substituted in the role of the United States as fiduciary (see Petition 2) and held the stock of every mixed-blood,* and even though the courts below purported to apply the same trust standards as apply to the Government in similar circumstances (see Petition 27).

2. The Bank's urging of "a good faith or reasonableness test" (Br. 19) is inconsistent with this Court's holding in *Mitchell* that (a) the Government's trust duties include "managing the Indian [property] so as to obtain the greatest revenue for the Indians . . ." (51 U.S.L.W. 5004) and (b) that there is a breach of trust "if the Secretary's duties are not perofrmed" *as prescribed by "statutes and regulations*, which clearly require that the Secretary" so act (51 U.S.L.W. 5005, emphasis added). That holding takes on added significance when considered in conjunction with the virtually simultaneous denial of certiorari in *United States* v. *Duncan*, 51 U.S.L.W. 3932 (U.S., June 28, 1983), for the holdings of the Court of Claims relied upon at page 25 of the Petition are now the holding of this Court in *Mitchell*. That circumstances, no doubt, accounts for the summary disposition of *Duncan*.

The Bank's agreement to protect the private treaty, discussed by Justice Blackmun in *Affiliated Ute*, is an obligation *created by statute* such as was referred to in *Mitchell*. That duty is acknowledged by the Bank to have been ignored

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*It is uncontroverted that the Bank held the stock certificates of all 490 mixed-bloods, including those who were not named trust beneficiaries. See Exhibits 90, 91, 92 and 93. *Cf.* 406 U.S. 128, 137.

at Br. 19. The Bank may not slide over that default, as it attempts to do with its urging that the BIA changed the policy so that it protected the "Tribe," for whom BIA remained guardian and trustee, and not the "*members* of the tribe," (see 25 U.S.C. §677n, App. E at 149), for whom the Bank was fiduciary. That argument will not withstand even a casual analysis. The Bank, not BIA, had the duty to administer the private treaty in its capacity as transfer agent. BIA had no authority to eliminate protective provisions mandated by an Act of Congress.

* * * *

Petitioners' complaint is thus plainly not against any policy adopted by Congress. To the contrary, Petitioners seek to enforce the legislative policy. Congress imposed adequate protections when it devised the private treaty and directed that a commercial fiduciary be established to administer that provision. The complaint is with the Bank's default in implementing that protection. The Bank, and the Bank alone, had those duties, and now has the responsibility for their breach.

On the facts that the Bank acknowledges, *Mitchell* and *Duncan* hold that there was both a trust and a breach, and *Arizona* v. *California* requires that the holding of *Affiliated Ute* on the trust and Rule 10b-5 duty questions be applied herein. Following these recent decisions in this Court, remanding those questions for further consideration of the courts below would be a needless squandering of judicial energy.

III

THE BANK'S ARGUMENTS ILLUSTRATE THAT THE RANGE SHARES WERE SECURITIES

The brief in opposition presents arguments on the securities law questions which are beyond the issues presented

by the Petition. The inconsistency of those arguments, moreover, establishes that the range shares were "securities."

1. The Bank's arguments at Br. 6 "that a number of the beneficiaries did not live near the range lands" and at Br. 21 that "[t]he asset sold was not a productive trust asset" are irreconcilable with its urging that these shares were not a "security." The Bank itself concedes at Br. 16 that the expectation of "profits" which renders an arrangement a "security" under the *Forman* holding includes "capital appreciation resulting from the development of the initial investment." The trust beneficiaries, those not living near the range in particular, had no other interest. It is an agreed fact, moreover, that the mixed-bloods were promised that they would realize profits in the market that would be devedoped for their shares. See Petition, page 18 at notes 20 and 21.

The Bank is thus forced to argue inconsistently with the agreed facts when it urges at Br. 14 that "[t]he corporations were created to facilitate use of range lands by the shareholders, not as potential investments" and that "limited cattle and sheep grazing privileges . . . represented the only potential for profit for the stockholders."

2. While urging at Br. 13-14 that the court below considered numerous factors in deciding that the range shares were not a "security," the Bank fails to cite a single factor that was considered other than the provisions of state law or matters that are mere incidents of the state statute (such as that 85% of the corporations' income was to come from assessments). Clearly the factors of negotiability, voting rights and appreciation in value, which are the elements of the *federal* definition mandated by this Court's *Forman* decision (see Petition 17) were not considered.

3. On the issue of federal supremacy, an appropriate response to this Court's holding in *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967) and the authorities cited at pages 14-17 of the Petition unanimously implementing that doctrine would be reference to some policy of Congress or decision by the courts allowing provisions of state law to control. The Bank cites no such authority.

4. Although the Bank asserts that "[n]o reported case . . . has ever held that stock in a nonprofit corporation . . . is a security" and is unable to conceive of non-profit corporations as an "important segment of industry" (Br. 17), it is worthy of note that other courts have in fact done so. *E.g.* Justice Traynor's important decision in *Silver Hills Country Club* v. *Sobieski*, 55 Cal. 2d 811, 361 P.2d 906 (1961). Indeed, this Court's *Forman* decision is specific in acknowledging that nonprofit corporations are securities if they meet the federal definition. Moreover, were the Bank's convoluted arguments herein to be adopted, enterprising promoters, whose schemes are usually based upon secondary market trading rather than the promise of dividends, would surely flock to the convenient "safe harbor" afforded by the decision below.

CONCLUSION

This Court should reverse or, in the alternative, direct a remand to the trial court for further proceedings consistent with *United States* v. *Mitchell*, ... U.S. ....., 51 U.S.L.W. 4999 (U.S., June 27, 1983); *Arizona* v. *California*, ... U.S. ....., 51 U.S.L.W. 4325 (U.S., Mar. 30, 1983); and *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972).

Respectfully submitted,

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